International Union of Operating Engineers Local 18 *and* Donley's Inc.

International Union of Operating Engineers Local 18 *and* Hunt Construction Group, Inc.

International Union of Operating Engineers Local 18 *and* Precision Environmental Co.

International Union of Operating Engineers Local 18 *and* Construction Employers Association

International Union of Operating Engineers Local 18 *and* B & B Wrecking and Excavating, Inc.

International Union of Operating Engineers Local 18 *and* Cleveland Cement Contractors, Inc.

International Union of Operating Engineers Local 18 *and* Laborers' Local 894, a/w International Union of North America, AFL–CIO, Party in Interest

International Union of Operating Engineers Local 18 *and* Laborers' Local 310, a/w International Union of North America, AFL–CIO, Party in Interest. Cases 08–CD–081840, 08–CD–091637, 08–CD–133957, 08–CD–091683, 08–CD–091684, 08–CD–091686, 08–CD–091770, 08–CD–091773, 08–CD–130178

May 6, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On April 9, 2015, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party Employers filed answering briefs, and the Parties in Interest filed a letter adopting the Employers' answering brief. The Respondent filed briefs in reply to both answering briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

In part, the complaint alleges that the Respondent, International Union of Operating Engineers Local 18, violated Section 8(b)(4)(ii)(D) of the Act by filing and maintaining pay-in-lieu grievances with an object of forcing the Charging Party Employers to assign the operation of certain construction equipment to employees it represented, contrary to two prior Section 10(k) determinations in which the Board awarded the work to employees represented by a different union. As found by the judge, and discussed further below, we agree that the Respondent violated the Act as alleged.[2]

The first 10(k) determination, *Laborers' Local 894 (Donley's Inc.) (Donley's I),* 360 NLRB No. 20 (2014), involved a jurisdictional dispute between the Respondent and Laborers' International Union of North America Local 894 (Local 894), concerning the operation of forklifts and skid steers at a construction site in Akron, Ohio, where Employer Donley's was building a parking garage for Goodyear. At the time of the Goodyear project, Donley's employed both operating engineers and laborers and was signatory to separate collective-bargaining agreements negotiated by the Associated General Contractors (AGC) and Respondent and AGC and Local 894. Donley's assigned the disputed forklift and skid steer work to its Local 894-represented employees, resulting in the Respondent threatening to strike the Goodyear project, conducting a one-day strike at the project, and filing a pay-in-lieu grievance alleging that the work assignment breached the jurisdiction clause of the 2010–2013 Respondent-AGC agreement. After Donley's informed Local 894 of the Respondent's grievance, Local 894 threatened to picket and/or strike, if necessary, to ensure the continued assignment of forklift and skid steer work to employees it represented. The Board found reasonable cause to believe that the threats to strike by both Un-

[1] In addition, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent filed two postbrief letters calling the Board's attention to a Division of Advice memorandum and recent case authority, and the General Counsel filed an opposition letter to the second postbrief letter. As to the second letter, we find that the decision cited by the Respondent, *Local 18 International Union of Operating Engineers v. Ohio Contractors Association*, No. 14–4294, 2016 WL 683246 (6th Cir. 2016), does not affect our decision here, as it raises only a procedural issue concerning the arbitrability of a provision in a collective-bargaining agreement different from the agreements in the instant case.

[2] The complaint further alleges that the Respondent violated Sec. 8(b)(4)(ii)(D) by threatening to strike Employer Donley's, violated Sec. 8(b)(4)(i) and (ii)(D) of the Act by engaging in a strike at Donley's project at the Goodyear jobsite, and violated Sec. 8(b)(4)(ii)(D) by threatening to strike the Construction Employers Association and the Employers, B & B Wrecking and Excavating, Cleveland Cement Contractors, Precision Environmental Co., and Hunt Construction Group. For the reasons stated by the judge, we agree that the Respondent violated the Act in these respects as well.

ions, and the strike by Respondent, constituted unlawful 8(b)(4)(D) conduct to enforce their claims to the disputed work, and awarded the forklift and skid steer work to employees represented by Local 894. 360 NLRB No. 20, slip op. at 5–7.

The second 10(k) determination, *Operating Engineers, Local 18 (Donley's Inc.) (Donley's II),* 360 NLRB No. 113 (2014), involved a jurisdictional dispute between the Respondent and Laborers' International Union of North America Local 310 (Local 310). The dispute concerned the operation of forklifts and skid steers at construction projects of Donley's and four other Employers—B & B Wrecking and Excavating (B & B), Cleveland Cement Contractors (Cleveland Cement), Precision Environmental Co. (Precision), and Hunt Construction Group (Hunt). The Employers employed operating engineers and laborers represented by the Respondent and Local 310, respectively, and, except for B & B Wrecking, were signatories to separate 2012–2015 agreements between each Union and the Construction Employers Association (CEA). During negotiations for these contracts, the Respondent's chief negotiator, Pat Sink, complained that for "far too long" the Employers had been assigning forklift and skid steer work to employees it did not represent, and that the Respondent was prepared to strike if such assignments continued. In late Spring 2012, the Employers commenced various construction projects in the Cleveland, Ohio area, and assigned the operation of forklifts and skid steers to their Local 310-represented employees. Starting on June 5, 2012, and continuing until October 1, 2014, the Respondent filed pay-in-lieu grievances against the Employers at each construction project alleging that the assignment of forklifts and skid steers to employees it did not represent breached the work jurisdiction clause of the Respondent-CEA contract. CEA Executive Vice President Linville wrote Local 310 business manager Terence Joyce that Respondent was engaged in an "area-wide" campaign of filing grievances against the Employers.[3] Joyce responded by letter that Local 310 would picket and strike all projects if the disputed work was reassigned. The Board found reasonable cause to believe that the Respondent's and Local 310's strike threats constituted 8(b)(4)(D) conduct to enforce their claims to the disputed work, and awarded the forklift and skid steer work to employees represented by Local 310. 360 NLRB No. 113, slip op. at 5–7.

The Respondent refused to comply with the Board's awards in both *Donley's I* and *II*. It continued to process the Goodyear pay-in-lieu grievance in *Donley's I* and the pay-in-lieu grievances against the Employers in *Donley's II*. It also filed new pay-in-lieu grievances against Donley's and a new grievance against Cleveland Cement after the Board issued *Donley's II*.

[3] Donley's was not named in this letter because the first of the several grievances had not yet been filed against it.

DISCUSSION

As the judge correctly observed, the Board has long held that a union's pursuit of contractual claims to obtain work that the Board has awarded in a 10(k) determination to another group of employees, or to secure monetary damages in lieu of the work, violates Section 8(b)(4)(ii)(D). *Machinists Lodge 160 (SSA Marine, Inc*.), 360 NLRB No. 64, slip op. at 3 (2014); *Plasterers Local 200 (Standard Drywall, Inc.),* 357 NLRB 1921, 1923 (2011); *Sheet Metal Workers Local 27 (E.P. Donnelly, Inc.),* 357 NLRB 1577, 1578 (2011); and *Marble Polishers Local 47-T (Grazzini Bros.),* 315 NLRB 520, 522–523 (1994). As the Board explained in *Roofers Local 30 (Gundle Construction*), 307 NLRB 1429, 1430 (1992), enfd. 1 F.3d 1419 (3d Cir. 1993), "[s]uch post-award conduct is properly prohibited under Section 8(b)(4)(D) because it directly undermines the 10(k) award, which, under the congressional scheme, is supposed to provide a final resolution to the dispute over which group of employees are entitled to the work at issue." Applying these principles, we agree with the judge that the Respondent's maintenance of pay-in-lieu grievances against the Employers after the Board issued its 10(k) determinations, as well the subsequent filing of new pay-in-lieu grievances, violated Section 8(b)(4)(ii)(D) by seeking to undermine the Board's award of the disputed forklift and skid steer work to employees that it did not represent.

In exceptions, the Respondent renews two defenses raised and rejected by the Board in the 10(k) proceedings: (1) Local 894 in *Donley's I* and Local 310 in *Donley's II* engaged in collusion with the Employers to create a sham jurisdictional dispute, and (2) the pay-in-lieu grievances were lawful attempts to preserve the forklift and skid steer work that employees it represented historically had performed. We affirm the judge's rejection of both defenses.

(1) With respect to collusion, the judge refused to consider this defense on the basis that it was a "threshold issue" decided in the 10(k) proceedings and was not subject to relitigation in a subsequent 8(b)(4)(D) unfair labor practice proceeding. This determination is supported by well-established precedent. See e.g. *Standard Drywall*, supra, 357 NLRB at 1923 fn. 12. Nonetheless, even were we to consider the evidence presented by the Respondent, we would find it falls well short of establishing collusion. The Respondent contends that collusion is shown by Donley's notification to Local 894 business

manager Bill Orr in *Donley's I,* and the CEA's notice to Local 310 business manager Joyce in *Donley's II*, that the Respondent had filed pay-in-lieu grievances against the Employers, which prompted the Local 894 and 310 strike and picketing threats. The Respondent asserts that these threats were a "sham," designed to trigger a 10(k) award in favor of employees represented by Local 894 and 310. The Board, however, has previously rejected such arguments as "mere supposition" in the absence of supporting evidence. *Grazzini Bros*., supra, 315 NLRB at 522. The Respondent proffered no such supporting evidence in *Donley's I, Donley's II,* or the instant proceeding that even suggests that Local 894's and 310's picketing and strike threats were the product of collusion and not genuine. *Operating Engineers Local 150 (R&D Thiel),* 345 NLRB 1137, 1140 (2005) (finding no evidence of collusion where Teamsters told employer's president that it wanted him "to file a 10(k)" because of claims for disputed work made by Operating Engineers). Further, even had collusion been established, it would not have precluded the 10(k) proceedings below because the Respondent's own threats to strike in *Donley's I* and *II*, and its strike in *Donley's I*, were sufficient to establish reasonable cause to believe that Section 8(b)(4)(D) had been violated.[4]

(2) In assessing the Respondent's work preservation defense, the judge undertook a 2-part analysis. First, he determined which employers comprised the CEA and AGC multiemployer bargaining units represented by the Respondent; second, he examined whether employees represented by the Respondent, and principally those of the Employers, in the multiemployer units performed the disputed forklift and skid steer work for employers in those units. As to the first factor, the judge found that the appropriate CEA and AGC multiemployer bargaining units consisted only of those employers who unequivocally authorized the CEA and AGC to negotiate on their behalf, and did not include employers who merely adopted the agreements subsequently negotiated by the CEA and AGC. Applying this determination, the judge found that the CEA-Respondent unit consisted of approximately 28 employers during the term of the 2012–2015 agreement, including Employers Donley's, Cleveland Cement, Precision, and Hunt, and that the employees of all these employers were included in this multiemployer unit. Because B & B Wrecking had not authorized CEA to bargain on its behalf, the judge concluded that its employees were not included in the multiemployer bargaining unit; rather, they constituted a separate unit. He reached the same conclusion with respect to Donley's relationship to the AGC-Respondent unit, finding that because the record failed to show unequivocally that Donley's had authorized the AGC to bargain on its behalf for the 2010–2013 agreement, it was not included in the multiemployer unit and its employees constituted a separate unit.

Addressing the second factor, the judge applied the principles of *Carpenters (Prate Installations, Inc.),* 341 NLRB 543, 544 (2004), by examining whether the Respondent had met the required showing that the employees it represented performed the disputed forklift and skid steer work, "*and* that it was not attempting to expand its work jurisdiction" (emphasis in original). He found that the Respondent failed to make this showing. He determined that except for two employees of Employer Precision, and several other employees of employers in the CEA bargaining unit, Employers Donley's, Cleveland Cement, and Hunt had always assigned the disputed work to their Local 310-represented employees rather than to their Respondent-represented employees. The judge therefore concluded that by engaging in 8(b)(4)(D) conduct to secure all the disputed work for employees it represented, including that which had always been performed by Local 310-represented employees, the Respondent's "objective was not that of work preservation, but rather work acquisition."

The judge found that the Respondent's work acquisition objective was "even more apparent" with respect to Employer B & B Wrecking because its employees constituted a unit separate from the CEA multiemployer unit, and B & B had never assigned the disputed forklift and skid steer work to employees represented by the Re-

[4] We also reject the Respondent's argument that the CEA, the Employers, and Local 310 colluded to create a sham jurisdictional dispute in *Donley's II* by "surreptitiously negotiating" the same language in the work jurisdiction clause of the 2012–2015 CEA-Local 310 contract as was in the 2009-2012 and 2012–2015 CEA-Respondent agreements. Unlike the CEA-Respondent agreements which for years had specifically identified forklifts and skid steers in the work jurisdiction clauses, the CEA-Local 310 agreements generally identified the tasks to be performed by laborers and stated that equipment used to perform those tasks was to be assigned to laborers. In April 2012, during contract negotiations, Local 310 proposed, and the CEA agreed to, a revised work jurisdiction clause that expressly stated that laborers' work included the operation of forklifts and skid steers.

Contrary to the Respondent, we see nothing nefarious or collusive in the CEA and Local 310 negotiating this revised jurisdictional language. At the time of their negotiations, the Respondent had commenced a campaign in both *Donley's I* and *II* to have forklift and skid steer work assigned to their represented employees—work that Respondent representatives Russell and Sink admitted had been given away "a long time ago." Considered in this context, we find that the agreement between the CEA and Local 310 to revise their contractual work jurisdiction provision in response to the Respondent's attempts to obtain the disputed work was not improper. As CEA official Linville explained, the revision was simply to "clarify that Laborers use these pieces of equipment to perform their duties" for the Employers which, as the record shows, had been the case for many years.

spondent. Similarly, because Employer Donley's was a separate unit and not part of the multiemployer AGC unit, the judge concluded that the Respondent's attempt to have employees it represented perform all the disputed work that Donley's had consistently assigned to Local 894-represented employees demonstrated its objective to acquire, rather than preserve, unit work.

The Respondent argues in exceptions that the judge erred by finding that the appropriate units for analyzing its work preservation defense consisted only of employers that assigned their bargaining rights to the CEA and AGC. It contends, relying on *Teamsters Local 282 (D. Fortunato, Inc.),* 197 NLRB 673, 675 fn. 10 (1972), that the appropriate CEA and AGC units also included employers that were not members of the CEA and AGC but that had adopted the agreements negotiated by both Associations. The Respondent contends that this latter group included "hundreds of employers" whose Respondent-represented employees had performed the disputed work. Thus, contrary to the judge, the Respondent argues that it demonstrated its work preservation objective by showing that employees it represented performed the disputed forklift and skid steer work in the appropriately constituted CEA and AGC units.

In adopting the judge's rejection of the Respondent's work preservation defense, we find it unnecessary to rely on his bargaining unit analysis. Regardless of what units are appropriate, and whether Respondent–represented employees in those units have ever performed the disputed forklift and skid steer work, the relevant inquiry under settled precedent is whether the Respondent was attempting to expand its work jurisdiction to employers whose Respondent-represented employees had never performed the disputed work. See *Laborers Local 265 (Henkels & McCoy),* 360 NLRB No. 102, slip op. at 4–5 (2014); *Stage Employees IATSE Local 39 (Shepard Exposition Services),* 337 NLRB 721, 723 (2002). The Respondent cannot reasonably dispute that this was its objective. As the judge found, the Employers' forklift and skid steer work had rarely been performed by Respondent-represented employees, a fact that Respondent's representatives openly acknowledged. As discussed above, during negotiations for a successor CEA-Respondent contract in April 2012, Respondent negotiator Sink lamented that for "far too long" the Employers had been assigning their forklift and skid steer work to employees other than those whom Respondent represented and that it was prepared to strike if such assignments continued. Respondent official David Russell similarly remarked to Donley's, when threatening to strike the Goodyear project over the assignment of forklift and skid steer work to Local 894-represented employees, that "[w]e're just trying to get back what we gave away a long time ago." Thus, at best, the Respondent was attempting to acquire assertedly long-lost work; this constitutes work acquisition, not work preservation. *Donley's II*, 360 NLRB No. 113, slip op. at 5.[5]

In sum, we agree with the judge that by maintaining the grievances in *Donley's I* and *II* and by filing new grievances after the Board's 10(k) determinations in those cases, the Respondent sought to undermine the Board's 10(k) awards and coerce the Employers to reassign work awarded to Local 894 and 310-represented employees to employees the Respondent represents. Accordingly, by engaging in this conduct, the Respondents violated Section 8(b)(4)(ii)(D).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Union of Operating Engineers, Local 18, its officers, agents, and representatives, shall take the action set forth in the Order.

Dated, Washington, D.C. May 6, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Karen Neilsen, Esq., for the General Counsel.
Timothy R. Fadel and William F. Fadel, Esqs., for the Respondent.
Frank W. Buck, Meredith C. Shoop, and Mary Reid, Esqs., for the Charging Parties.
Basil W. Mangano, Esq., for the Party in Interest, Laborers' Local 310

[5] The Respondent argues that "exclusivity of performance" is not a prerequisite to a claim of work preservation and that the judge erred to the extent that he relied on *Prate Installations* to find that its work preservation defense required a showing that the employees it represented performed the work exclusively in the CEA and AGC units. We reject the Respondent's argument. Although the Board "considers exclusivity as an important factor" to a work preservation defense, *Henkels & McCoy*, supra, slip op. at 5 fn. 10 (2014), it does not consider it a prerequisite and the judge did not so hold in rejecting the Respondent's work preservation defense.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Cleveland, Ohio, on November 6–7, 10, 12–14, and 17–21, 2014. Donley's Inc. (Donley's) filed the charge in Case 08–CD–081840 on May 25, 2012, in Case 08–CD–091637 on October 18, 2012, and in Case 08–CD–133957 on August 1, 2014. Hunt Construction Group, Inc. (Hunt) filed the charge in Case 08–CD–091683 on October 19, 2012. Precision Environmental Co. (Precision) filed the charge in Case 08–CD–091684 on October 19, 2012. The Construction Employers Association (CEA) filed the charge in Case 08–CD–091686 on October 19, 2012. B & B Wrecking and Excavating, Inc. (B & B) filed the charge in 08–CD–091770 on October 19, 2012. Cleveland Cement Contractors, Inc. (Cleveland Cement) filed the charge in Case 08–CD–091773 on October 19, 2012, in Case 08–CD–130178 on June 5, 2014, and an amended charge in that case on September 26, 2014.[1] On September 30, 2014, the General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing (the complaint), which was amended at the hearing.

The International Union of Operating Engineers Local 18 (the Respondent) filed an answer denying the substantive allegations of the complaint.

The complaint alleges that the Respondent violated Section 8(b)(4)(ii)(D) on February 20, 2012, by threatening to strike Donley's because it had assigned work to employees represented by Laborers' Local 894 (Local 894) rather than employees represented by the Respondent. The complaint also alleges that the Respondent violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in a strike from February 22–23, 2012, at Donley's project at the Goodyear jobsite in Akron Ohio because Donley 's assigned the operation of forklifts and skid steers on that project to employees represented by Local 894 rather than employees represented by the Respondent. The complaint further alleges that on April 20, 2012, the Respondent violated Section 8 (b)(4)(ii)(D) by threatening to strike Donley's because it had assigned work to employees represented by Local 894 and to Laborers' Local 310 (Local 310)[2] rather than employees represented by the Respondent. The complaint also alleges that on April 30, 2012, the Respondent violated Section 8(b)(4)(ii)(D) by threatening to strike the CEA and the Employers because the Employers assigned the operation of forklifts and skid steers to employees represented by Local 310 rather than employees represented by the Respondent. Finally, there are a substantial number of complaint allegations that the Respondent violated Section 8(b)(4)(ii)(D) of the Act by maintaining and filing grievances with an object of forcing the Employers to assign the operation of forklifts and skid steers to employees represented by the Respondent, contrary to two earlier Section 10(k) awards where the Board awarded the work to employees represented by the Laborers[3] and Local 310.[4]

The Respondent's answer denies the commission of any unfair labor practices and raises as an affirmative defense that its actions, including the filing of grievances seeking money damages as a result of the Employers' decision to assign the operation of forklifts and skid steers to someone other than an operating engineer, are for the purpose of preserving and protecting work traditionally performed by employees represented by the Respondent. The Respondent asserts that its work preservation efforts cannot be found to be the subject of a violation of Section 8(b)(4)(D) of the Act. After the issuance of the complaint, the Respondent filed a motion for summary judgment with the Board. On October 31, 2014, the Board denied the Respondent's motion.

On the entire record,[5] including my observation of the demeanor of the witnesses,[6] and after considering the briefs filed by the General Counsel,[7] the Charging Parties, and the Respondent and I make the following

FINDINGS OF FACT

I. JURISDICTION

Donley's, Precision, B & B, and Cleveland Cement are employers engaged in the construction industry with an office and place of business located in Northeastern Ohio and annually each purchases and receives goods valued in excess of $50,000 from points located outside the State of Ohio. Hunt is an employer engaged in the construction industry with a office and place of business in Indianapolis, Indiana, and annually purchases and receives goods valued in excess of $50,000 from points located outside the State of Indiana. I find that the Employers are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The CEA is a multiemployer bargaining association that represents construction industry employers in negotiating and ad-

[1] At times Donley's, Hunt, Precision, B & B, and Cleveland Cement will be referred to as "the Employers" and the CEA will be referred to separately. At times, the Employers and the CEA will be collectively referred to as the Charging Parties.

[2] At times Local 310 and Local 894 will be collectively referred to as the Laborers.

[3] *Laborers Local 894 (Donley's, Inc.*), 360 NLRB No. 20 (2014) (*Donley's I*).

[4] *Operating Engineers Local 18 (Donley's Inc.)* 360 NLRB No.113 (2014) (*Donley's II*).

[5] Pursuant to an unopposed motion made by the Employers and the CEA, I admitted into evidence the hearing records in both *Donley's I* and *Donley's II*. Sections 102.91 and 102.92 of the Board's Rules and Regulations provide that the record of a 10(k) proceeding shall become part of the record in an unfair labor practice proceeding under Section 8(b)(4) (D) of the Act.

[6] In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.* 179 F.2d 749, 754 (2d Cir. 1950) revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007). In addition, I have carefully considered all the testimony in contradiction to my factual findings and have discredited such testimony.

[7] While at the trial I indicated I expected that the brief filed by the General Counsel, as the proponent of the complaint, to set forth a recommended order and notice from my consideration (Tr. 2688), the brief that was filed did not contain such a provision.

ministering collective-bargaining agreements with various labor organizations. Donley's, Cleveland Cement, Hunt, and Precision have assigned their bargaining rights to the CEA and, through the CEA, are signatories to separate contracts negotiated by the CEA with Local 310 and the Respondent. As those employers have delegated bargaining authority to the CEA, and each of those employers satisfies the applicable jurisdictional standard, I find that the CEA is an employer within the meaning of Section 2(2) of the Act.[8]

I find that the Respondent, Local 310, Local 894 and the Ohio and Vicinity Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (Carpenters) are labor organizations within the meaning of Section 2(5) of the Act.

I. ALLEGED UNFAIR LABOR PRACTICES

Background

The Prior 10(k) Awards

Donley's is a contractor engaged in concrete construction. In May 2011, Donley's began work at the Flats East Bank Development project in Cleveland, Ohio. At this project, Donley's assigned forklift work to employees represented by Local 310. At the time Donley's was bound to agreement between Local 310 and the Construction Employers Association (CEA), a multiemployer bargaining association that Donley's was a member of. The CEA agreement with Local 310 covers building construction work in Cuyahoga and Geauga Counties, and thus covered the above noted project in Cleveland.

Donley's was also signatory to a separate collective-bargaining agreement covering building and construction work between the Respondent and the CEA that was effective from 2009 to 2012. The Respondent's agreement with the CEA was applicable in the Ohio Counties of Ashtabula, Cuyahoga, Erie, Geauga, Lake, Huron Lorain, and Medina. Thus, the Flats East project was also within the geographical jurisdiction of this agreement.

In November 2011, Donley's began the construction of a parking garage for Goodyear in Akron, Ohio. On the Goodyear parking garage project Donley's assigned forklift and skid steer work to employees represented by Local 894. At the time Donley's was signatory to a building agreement between Local 894 and the Associated General Contractors of Ohio (AGC), another multiemployer bargaining association. This agreement covered building and construction work in Summit, Portage, and Medina Counties in Ohio, Akron is located in Summit County.

The Respondent also had an agreement with the AGC that was effective from 2010 to 2013, that covered most of the counties in Ohio, except for those covered by the Respondent's agreement with the CEA, and a few others. In *Donley's I*,[9] the Board found that Donley's had signed that agreement intermittently since at least 1990.

In *Donley's I*, the Board found that both the Respondent and Local 894 and Local 310 had claimed the work in dispute (the operation of forklifts and skid steers) for the employees they respectively represent. The Board found that it had reasonable cause to believe that Local 894 and the Respondent each had used means proscribed by Section 8(b)(4)(D) to enforce their claims for the work in dispute, and that there was no agreed-upon method for voluntary adjustment of the disputes. Applying established criteria, the Board determined that employees represented by Local 310 were entitled to perform the operation of forklifts at the Flats East Development project in Cleveland, Ohio and that employees represented by Local 894 were entitled to perform the operation of forklifts and skid steers at the Goodyear parking garage jobsite in Akron, Ohio.

In *Donley's II,* the Employers and the CEA filed unfair labor practice charges under Section 8(b)(4)(D) alleging that Local 310 and the Respondent had used proscribed means to claim the operation of forklifts and skid steers on the Employers' jobsites. The Board found that both the Respondent and Local 310 had made competing claims to the work, that both threatened to use means proscribed by Section 8(B)(4)(D) to enforce their competing claims for the work in dispute, and that there was no agreed-upon method for the voluntary adjustment of the dispute. After applying its traditional criteria, the Board determined that employees represented by Local 310 were entitled to perform the operation of forklifts and skid steers on the Employers' jobsites. Under the circumstances present in that case, the Board determined that a broad area-wide award, coextensive with the Employers' operations where the two unions' jurisdictions overlap, was appropriate. Accordingly, the Board awarded work utilizing forklifts and skid steers to the employees of the Employers who were represented by Local 310 in the area where their employers operate and the jurisdiction of Local 310 and the Respondent overlap.

After the Board issued its award in *Donley's I*, the Respondent indicated that it would not comply with the portion of the award involving the Goodyear jobsite in Akron, Ohio.[10] In addition, the Respondent continued to process a pay-in-lieu grievance against Donley's regarding the assignment of forklifts and skid steers on the Goodyear project under its agreement with the AGC. After the Board's award in *Donley's II*, the Respondent again indicated that it would not comply with the 10(k) award and that it would continue to process and file pay-in-lieu grievances regarding the assignment of forklifts and skid steer work to any employees not represented by the Respondent. Accordingly, the instant consolidated complaint issued.

THE FACTS

The Disputed Equipment

There are essentially two types of forklifts: industrial forklifts, sometimes referred to as towmotors, and all-terrain forklifts, sometimes referred to as rough-terrain forklifts. Industrial forklifts are motorized pieces of equipment that have four small hard rubber tires and a set of forks that can be raised and lowered. Industrial forklifts are typically used on hard surfaces. All-terrain forklifts are larger than industrial forklifts and are equipped with four large rubber tires. As the name suggests, all-terrain forklifts can travel over muddy and uneven surfaces.

[8] *Donley's II*, slip op. at 2 fn. 6 and cases cited therein.

[9] *Donley's I*, slip op. at 4.

[10] With respect to Donley's Flats East Development jobsite, the Respondent had withdrawn its grievance concerning the disputed assignment of forklifts based on the timeliness of its grievance.

All-terrain forklifts generally are equipped with forks placed at the end of an extendable boom. Because of the extendable boom, all-terrain forklifts are versatile pieces of equipment that can be used in a number of ways, including hoisting materials above the first floor of a building.

Skid steers are motorized pieces of equipment that either use four rubber tires or a tracked wheel system. A "bobcat" is a type of skid steer made by a particular manufacturer. Skid steers often use a bucket attachment to transport or grade earth and other materials. However, skid steers can also be operated with other attachments such as saws, rollers, and a bulldozer blade.

Both forklifts and skid steers are commonly used on construction sites and are utilized in a variety of ways including the transportation of materials, excavation, grading, trenching, demolition, and sweeping.

The Multiemployer Agreements

The AGC is a multiemployer bargaining association that has had a collective-bargaining relationship with the Respondent since 1980. The most recent AGC agreement for "building construction" with the Respondent was effective from May 8, 2013, through April 30, 2017, and applies to all counties in the State of Ohio except Ashtabula, Cuyahoga, Geauga, Lake, Columbiana, Mahoning, and Trumbull, and includes four counties in Kentucky. This agreement refers to the operation of forklifts and skid steers as being within the work jurisdiction of the employees covered under the agreement. (L. 18 Exh. 179.)[11] The prior agreement between the AGC and the Respondent was effective from May 1, 2010, through April 30, 2013 (GC Exh. 8). Both of these agreements make reference to forklifts and skid steers as being within the jurisdiction of the employees covered by the agreement.

The 1980–1983 AGC agreement with the Respondent identified "forklifts" as equipment operated by an operating engineer under the terms of the agreement (L. 18 Exh. 178 A1 at p. 28). The agreement also provided for an exclusive hiring hall. The 1983–1985 AGC agreement with the Respondent identified the operation of forklifts "(All Types)" (L. 18 Exh. 178 A2 to at p. 28) as being covered under the agreement. This agreement also included work preservation language in paragraph 22 indicating "If an Employer violates paragraph 21, the Employer's penalty shall be to pay the first qualified and registered applicant the applicable wage and fringe benefits from the first day of the violation.[12] The 1987–1989 agreement between the AGC and the Respondent continued to refer to forklifts as being within the jurisdiction of employees working under the agreement.

The 1989–1992 AGC agreement with the Respondent was amended to specifically include "Bobcat Type and/or Skid-steer Loader" as equipment that was within the jurisdiction of the employees working under the agreement. Later AGC agreements continued to make reference to the operation of forklifts and skid steers as being within the jurisdiction of employees working under the agreement. The work preservation clause and the exclusive hiring hall provisions that were contained in prior agreements are contained in the two most recent agreements between the AGC and the Respondent.

The CEA is a multiemployer bargaining association that has had a history of collective-bargaining with the Respondent since 1985.[13] The CEA's most recent contract with the Respondent, which is effective by its terms that May 1, 2012 through April 30, 2015, applies to "building construction" in the Ohio Counties of Ashtabula, Cuyahoga, Erie, Geauga, Huron, Lorain, and Medina. The work jurisdiction of employees working under the agreement specifically includes forklifts and skid steers. (GC Exh. 5.) The CEA agreement with the Respondent effective from May 1, 2009, through April 30, 2012, contains the same reference to forklifts and skid steers as being within the work jurisdiction of employees working under the agreement. (L.18 Exh. 178 B2) The previous agreements between the CEA and the Respondent since 1985 had all made references to forklifts and a "Bobcat" or skid steer loader as being within the work jurisdiction of employees employed under the agreement.

The most recent collective-bargaining agreement between the CEA and the Respondent contains a provision, paragraph 20, reflects, "that the work jurisdiction of the Operating Engineers, as assigned by the AFL–CIO, will be respected and all Operating Engineer work will be performed by an Operating Engineer." paragraph 21 of the CEA agreement states that "[i]f the Employer assigns any piece of equipment to someone other than the Operating Engineer, the employer's penalty shall be to pay the first qualified registered applicant the applicable wages and fringe benefits from the first day of the violation." The CEA agreement with the Respondent also provides for an exclusive hiring hall. The "work preservation" clauses and the exclusive hiring provisions of the current agreement were contained in the prior agreements between the CEA and the Respondent.

The AGC has had a collective-bargaining relationship with Local 894 but the record is not as fully developed as to the length of that relationship. The most recent building agreement between the AGC's Akron division and Local 894 is effective from June 1, 2012, through May 31, 2016 in the Ohio counties of Summit, Portage, and Medina. (GC Exh. 7.) This agreement provides a list of covered work classifications that includes the forklifts and skid steers. The 2011–2012 agreement between Local 894 and the AGC contains the same list of covered work

[11] The Respondent's exhibits were introduced at the trial as a "Local 18" exhibit. For ease of reference I will refer to such an exhibit as a "L. 18 Exh."

[12] Paragraph 20 of that agreement states "that the work jurisdiction of the Operating Engineers as assigned him by the AFL–CIO will be respected and all Operating Engineer work will be performed by an Operating Engineer." At the trial, the uncontradicted testimony of Richard Dalton, the Respondent's president, was that both the Respondent and the AGC have long accepted that the reference to paragraph 21 in the 1983–1985 and subsequent agreements was in error and should have referred to paragraph 20. Dalton further testified that this error was corrected in the most recent contract between the AGC and the Respondent and that paragraph 22 of the 2013–2017 agreement states, if an employer violates Paragraph 20, the employer's penalty shall be to pay the first qualified registered applicant the applicable wage and fringe benefits from the first day of the violation.

[13] From 1980 to 1985 the AGC agreement was applicable to the counties later covered by the CEA agreement with the Respondent.

classification. The 2012–2016 agreement also includes a provision stating that the operation of forklifts and skid steers "when used in the performance of the aforementioned work jurisdictions shall be the work of the Laborer."

The 2009–2012 agreement between the CEA and Local 310 includes a jurisdictional clause that indicates that the agreement applies "[w]here power is used in the moving, loading or unloading of concrete forms" and other materials as an adjunct to carpentry work. The 2012–2015 agreement between the CEA and Local 310 contains a revised jurisdictional clause that states that the operation of forklifts and skid steers, used for the purpose of tending a craft or in performance of work covered under the agreement "shall be the work of the laborer. Any Employer not assigning work in accordance with this Section shall be considered in violation of this Agreement." (GC Exh. 6, p. 9.)

Donnelly's Assignment of the Disputed Work

Donley's concrete operations manager, Greg Przepiora, testified that he has been employed by Donley's since March 1998. Przepiora's uncontradicted and credited testimony establishes that during the time of his employment, Donley's has employed composite crews of employees represented by the Laborers and the Carpenters in performing its concrete work. The carpenters set and strip the forms that the concrete is poured into and the laborers assist the carpenters by bringing materials where needed. Donley's practice has been to assign the operation of industrial forklifts to employees represented by the Laborers for the work of tending the carpenters and for the cleanup of the site. The operation of industrial forklifts, at times, is also assigned to employees represented by the Carpenters for the actual process of setting and stripping the forms. All-terrain forklifts are generally assigned to employees represented by the Laborers but, at times, Carpenters-represented employees also operate such equipment. Skid steers are used primarily to clean up the jobsite and Donley's assigns this operation to employees represented by the Laborers.[14]

Przepioira testified that Donley's regularly uses Operating Engineer-represented employees to operate cranes on its jobsites. At times, Donley's also utilizes operating engineers to operate excavating equipment such as bulldozers, rollers, excavators and backhoes.

According to the uncontradicted and credited testimony of Przepiora and Dilley, pursuant to a request made by the Respondent, a luncheon meeting was held in March 2010 at a restaurant in the Cleveland area, between Przepiora and Dilley and the Respondent's business representatives, David Russell and Michael Delong. At the meeting, the Respondent's representatives requested that Donley's assign the operation of forklifts and skid steers on its projects to employees represented by the Respondent. Dilley responded that Donley's had not previously utilized employees represented by the Respondent to operate skid steers and forklifts. The Donley's representatives explained that there would be a substantial increase in labor costs if the work was assigned to employees represented by the Respondent. Dilley told the Respondent's representatives that the laborers and carpenters may utilize this equipment for part of a work day in order to perform their duties but not for the whole day. Donley's representatives indicated that assigning an operating engineer to operate a piece of equipment on a full-time basis when the equipment is not used for the entire day would add to labor costs. They further indicated that the hourly rate of an operating engineer was higher than the rate paid to a laborer. Russell responded that that it might be possible to adjust the rates paid to employees represented by the Respondent by assigning some apprentices to a forklift or skid steer. Russell indicated that he would send to Dilley some rates for him to consider. After the meeting, Russell did send Dilley some proposed labor rates but Dilley took no action with respect to it.

The Goodyear Project

In October 2011, Donley's began the construction of a new parking garage for Goodyear in Akron, Ohio. Donley's was the construction manager for this project and also performed the structural concrete work. On November 22, 2011, a prejob conference was held between Przepiora and the Respondent's representatives, Russell and Joe Lucas, at Donley's trailer at the Goodyear site. Przepiora testified that at this meeting the parties went over a "Pre-Job Conference" form utilized by the Respondent. The form utilized at this meeting (GC Exh. 51) outlines the parameters of the job and indicates the name of the employer, whether there are any subcontractors, the type of equipment needed, and the number of operating engineers needed. According to Przepiora, the Respondent's representatives asked who would be assigned to operate the forklifts and Przepiora responded, "carpenters and laborers." Przepiora further indicated that the operation of tower cranes would be assigned to operating engineers. At that point, Lucas stated "Let's see if these other crafts can run your tower cranes.' Lucas also said that the Respondent did not agree with this and he got up and walked out of the meeting.

According to Przepiora, he then asked Russell if he could have a copy of the agreement between Donley's and the Respondent because Przepiora did not have one. Russell stated that Przepiora could not have one and the meeting was over. Przepiora then left the trailer and walked outside to where Lucas was getting into his truck. Przepiora spoke briefly to Lucas who repeated his statement about seeing if the other crafts could run the tower cranes before he left the jobsite.

Russell testified that in November 2011, after learning that Donley's was going to construct a parking garage for Goodyear in Akron, Ohio, he called Przepiora. According to Russell, he congratulated Przepiora on obtaining the work and told him that they needed to meet and conduct a prejob conference. Russell testified that after this conversation he contacted the Respondent's office and asked the individual who maintains contracts, whether Donley's was signatory to the existing AGC agreement, since the Goodyear parking garage job occurred within the jurisdiction of that agreement.[15] Russell was informed that

[14] Przepiora's testimony regarding the assignment practices of Donley's is corroborated by the testimony of Donley's senior vice-president of concrete operations, Michael Dilley, who began to work for Donley's in 2000.

[15] Russell's testimony did not include the name of the individual he spoke to.

the Respondent did not have a copy of such an agreement.

According to Russell, after he observed work being performed on the Goodyear site, he called Przepiora again and reminded him that "we needed to get a contract and conduct a pre-job." Przepiora indicated that he would look into it and obtain a copy of Donnelly's AGC agreement with the Respondent. Przepiora and Russell then agreed to meet and conduct a prejob conference on November 22, 2011. Russell testified that at the meeting he filled out the prejob conference form based on the answers given to him by Przepiora. According to Russell, as they neared the end of the completion of the form, he asked Przepiora if he had been able to obtain a signed AGC contract and Przepiora replied that he had not. Russell testified he then stated that they could not conduct a prejob conference with a contractor who was not signatory to an agreement and that the Respondent's representatives then refused to sign the prejob conference form and left the meeting. Lucas did not testify at the trial and Russell did not testify about anything that Lucas said at the meeting.

The pre-job conference form reflects that it was completed in its entirety except for the fact that it was not signed by either party. As noted above, Russell testified that all the writing on the form was his. I note that at the end of the form the following appears: "assigning skid steers & forklifts to laborers & carpenters assigning small equipment maintenance and operation to Teamsters. Local 18 does not agree."

I find that neither the testimony of Przepiora or Russell is entirely credible regarding this meeting. In making my findings regarding what occurred at this meeting, I also considered the testimony of Dalton, the Respondent's president. Dalton testified that after the meeting with Prrzpiora, Russell and Lucas contacted him to see if there was a record of Donley's being signatory to the AGC agreement. Dalton testified that he researched the records at the Respondent's headquarters and could not find any evidence that Donley's was signatory to the then current AGC agreement. Dalton then called Richard Hobbs, the executive vice president of the AGC, and asked him if he could produce any documents showing that Donley's had assigned their bargaining rights to the AGC with respect to the AGC contract with the Respondent. According to Dalton, when Hobbs did not produce any evidence of Donley's assignment of bargaining rights, Dalton then contacted the Respondent's fringe benefit office which collects association dues from contractors and then disburses those dues to the appropriate bargaining association. Dalton testified he reviewed the prior 14 months of those dues records and could find no dues paid by Donley's during that period.

I note that the evidence is equivocal regarding whether Donley's was, in fact, an actual signatory to the 2010–2013 AGC agreement in November 2010. In this connection, on April 20, 2010, Hobbs sent a letter to Sink with an attached list entitled "AGC Ohio LRD/Operators Local 18 Signatory Contractors" (L. 18 Exh. 187 p. 5). This document reflects that the name of an employer appearing in bold type indicates that it was a current signatory employer. With regard to an employer whose name appears in regular type, the document reflects, "Have no record of current status. Previously signatory to the agreement." The name Donley's Inc. appears in regular type on this document (L. 18 Exh. 187 p. 6). On the other hand, another document introduced into evidence by the Respondent at the trial indicates that Donley's was bound by the 2010–2013 AGC contract with the Respondent because it was a member of the AGC and had assigned its bargaining rights to it (L. 18 Exh. 173D). [16] This document is corroborated by the Dilley's testimony that Donley's paid dues to the AGC for 2010, 2011, 2012, 2013, and 2014 and the corresponding documents reflecting those payments. (GC Exhs. 81A–G.)

I do not find credible Przepiora's testimony that he asked Russell for a copy of the agreement between Donley's and the Respondent and that Russell merely replied, "no." Such testimony is implausible given the testimony of Russell and Dalton regarding the efforts they made, without success, to obtain a current agreement between Donley's and the Respondent in November 2011. Rather, I find that Russell asked Przepiora if he had been able to find a copy of a signed agreement between Donley's and the Respondent and Przepiora indicated that he had not. On the other hand, I do not believe Russell's testimony that the only reason that he and Lucas refused to sign the prejob conference form was because there was no evidence of a signed agreement at that time. As noted above, the entire prejob conference call form was filled out except for signatures. In Russell's own handwriting, the prejob conference form indicates that the Respondent did not agree with Donley's decision to assign skid steers and forklifts to laborers and carpenters. I doubt that Russell and Lucas would go through the entire lengthy pre-job conference form and specifically note on it the Respondent's dispute with the assignment of forklifts and skid steers, if the only issue was the lack of any evidence of a signed contract between Donley's and the Respondent.

I note, in particular, that Przepiora's testimony regarding statements made by Lucas is uncontradicted as Lucas did not testify and Russell did not testify regarding any statements made by Lucas. I also find Przepiora's testimony on this point to be plausible when I consider the record as a whole. Therefore, I credit Przepiora's testimony that after he stated that Donley's was going to assign the operation of forklifts and skid steers to employees represented by the Laborers and the Carpenters and the operation of tower cranes to operating engineers represented by the Respondent, Lucas stated "Let's see how if these other crafts can operate your tower cranes" and later repeated that statement. Accordingly, I find that Respondent's representatives refused to sign the prejob conference form because there was no evidence of a signed agreement between Donley's and the Respondent and because the Respondent dis-

[16] This document, as will be explained in further detail later in this decision, is a summary of the contractors who are members of, and have assigned their bargaining rights to, the AGC. This document is compiled and maintained as a regular business document by the Respondent. Given the fact that a document introduced into evidence at the trial by the Respondent reflects that Donley's was bound to the 2010–2013 AGC agreement by virtue of assigning its bargaining rights to the AGC, I question the diligence with which Russell and Dalton undertook the search to determine whether Donley's was signatory to the AGC agreement. However, I do not doubt that they made one and, at that time, the Respondent had not discovered the document that it later introduced into evidence.

puted Donley's assignment of the operation of forklifts and skid steers to employees represented by Local 894 and the Carpenters, rather than to employees represented by the Respondent.

Donley's began the concrete work on the Goodyear garage project in December 2011. Donley's assigned the operation of forklift and skid steer work to either employees represented by Local 894 or the Carpenters. Donley's also utilized two cranes on the project which were operated by employees represented by the Respondent.

According to Przepiora's uncontradicted and credited testimony, in the beginning of February 2012, he was at the Goodyear jobsite when he received a call on the radio informing him that representatives of the Respondent were on the jobsite "causing problems." As Przepiora came out of Donley's trailer, he saw Russell and asked him what was going on. Russell stated that "he wanted Operators on the forklifts right now." When Przepiora responded that Donley's had never done that, Russell stated "You are going to do this, or I am going to shut this motherfucker down." (Tr. 306.) Przepiora told Russell that he was not supposed to be on the job site without going through orientation or signing a release form. Russell replied, "I am not leaving the job site; you will have to call Akron's finest to get me off the job site." Przepiora asked Russell to calm down and Russell then stated, "We're just trying to get back what we gave away a long time ago. You guys have been fucking us for 30 years." Russell left the job site shortly thereafter.

At the time of Russell's visit to the jobsite, Donley's was utilizing a rough-terrain crane and two tower cranes that were being operated by operating engineers represented by the Respondent. There were also two all-terrain forklifts that had been assigned to employees represented by Local 894 and several industrial forklifts that were being operated by both Local 894 and Carpenters-represented employees.

On February 22, 2012, Russell began picketing at a gate at the Goodyear jobsite. Other picketers join Russell including the Respondent-represented employees working on the jobsite. Because the tower cranes were not being operated, the jobsite had to be shut down. Signs carried by some of the picketers indicated: "I.U.O.E. Local 18 hereby protests against Donley's No contract." Other picketers stationed at gates 2 and 3 carried signs indicating: "This picket is not intended to prevent or encourage employees working for other employers from going to work."(L. 18 Exhs. 4 C and E.)

Przepiora called Donley's executive vice-president, Donald Dreier, and informed him that the jobsite was shut down because the Respondent was claiming that it did not have a signed agreement with Donley's. Dreier then spoke to Donley's General Counsel Mary Reid. According to Dreier's uncontradicted testimony Dreier and Reid then had a conference call with William Fadel, the Respondent's General Counsel. During this conference call Fadel stated that Donley's did not have a signed agreement with the Respondent. Dreier, Reid and Fadel agreed to meet in Fadel's office the next day to discuss the picketing.

At the meeting between Dreier, Reid, and Fadel on February 23, the parties debated whether or not Donley's was signatory to an existing agreement with the Respondent and most of the meeting was devoted to that topic. Dreier indicated to Fadel that he was somewhat perplexed by the Respondent's position since Donley's had just recently completed a parking garage for Bridgestone in Akron, which was very similar to the Goodyear project, and the issue of whether Donley's was signatory to the AGC agreement with the Respondent had never come up and there had been no work stoppages. During the meeting, Reid and Dreier raised the dispute between Donley's and the Respondent involving the assignment of forklifts and skid steers. Fadel responded that the Respondent's collective-bargaining agreement indicates "that it was primarily their work to perform." In order to resolve the strike, Dreier signed a collective-bargaining agreement with the Respondent on February 23, 2012. This agreement is a one-page document reflecting that Donley's, "although not a member of the AGC of Ohio Labor Relations Division, does hereby join in, adopt accept and become a party to the collective-bargaining agreement heretofore made by the AGC of Ohio Labor Relations Division with the International Union of Operating Engineers, Local 18 and its Branches, (AF L–CIO)" (GC Exh. 54). [17] After Dreier signed the agreement Fadel indicated that the parties would have to have another pre-job conference.

After Dreier signed the agreement binding Donley's to the AGC agreement, the strike ended at approximately noon on February 23. That same day Dreier went to the Goodyear jobsite and he and Przepiora met with Russell and Lucas and conducted another prejob conference. At this meeting, the Respondent's representatives were again informed that the forklifts will continue to be assigned to employees represented by either Local 894 or the Carpenters and the skid steers would be assigned to employees represented by Local 894. Both parties signed the prejob conference form (GC Exh. 53).

The Initial Grievances Filed by the Respondent

On February 27, 2012, the Respondent filed a grievance against Donley's under the AGC agreement for failing to employ operating engineers on its forklifts and skid steers at the Goodyear project. The grievance requested that Donley's pay a penalty under paragraph 22 of the AGC agreement to all qualified referral registered applicants, in the amount of all applicable wages and fringe benefits from the first day of the violation and continuing thereafter for each forklift and skid steer until the project's completion. (GC Exh. 55)[18]

On the same date, the Respondent filed a similar pay-in-lieu grievance against Donley's under the CEA agreement concerning the Flats East Development project in Cleveland, Ohio, which involved Donley's performance of structural concrete work on a building. In accordance with Donley's regular practice, the operation of forklifts and skid steers on this project was assigned to composite crews of employees represented by Local 310 and the Carpenters. As noted above, the Respondent did not pursue this grievance because it was filed untimely.

[17] The Board refers to such an agreement as a "me too" agreement. *Plumbers Local 669 (Lexington Fire Protection Group),* 318 NLRB 347, 348 (1995).

[18] Since the numerous grievances filed by the Respondent in this case are identical in kind to this grievance, I will refer to such grievances as "pay-in-lieu" grievances, consistent with the description used by the Board in *Donley's I* and *Donley's II.*

The April 20, 2012 Grievance Meeting

On April 20, 2012, representatives from the Respondent and Donley's met at the AGC office in Columbus for the third step grievance meeting concerning the grievance filed over the assignment of forklifts and skid steers at the Goodyear project.[19] Dalton and Business Representative Mark Totman represented the Respondent. Reid, Dilley, and Przepiora were present for Donley's. The grievance was not resolved by the panel as it split evenly.

During the discussions involving the grievance, the uncontradicted and credited testimony of Dilley establishes that Totman stated he was looking forward to coming to Cleveland "to battle with Terry Joyce on this forklift and skid steer issue."[20] (Tr. 1131–1132.) Dilley further testified that Totman told the Donley's representatives that they would be sorry on May 1 when they needed the Operating Engineers and were siding with the Laborers on this issue.[21] (Tr. 1132.) Przepiora uncontradicted and credited testimony corroborates that of Dilley regarding the statement made by Totman and Prezpiora also recalls that Dalton stated that Donley's would be sorry in May when negotiations began.

The April 2012 Negotiations Between the CEA and the Respondent

Prior to the beginning of negotiations between the CEA and the Respondent on April 4, 2012, Donley's, Cleveland Cement, and Precision had assigned their bargaining rights to the CEA for both the negotiations involving the Respondent and Local 310. In this connection, on January 6, 2012, Linville sent a letter to the Respondent enclosing a list of 28 employers, including Donley's, Cleveland Cement and Precision that had assigned their bargaining rights to the CEA for the purposes of negotiating a collective-bargaining agreement with the Respondent. (GC Exhs. 20 B and C) [22] In June 2012, Hunt became a member of the CEA and assigned its bargaining rights to the CEA. (GC Exhs. 18 and 19.)

At the first bargaining meeting held on April 4, 2012, Timothy Linville, CEA's executive vice president, was present along with the CEA's bargaining committee, which was composed of Rob DiGeronimo from Independence Excavating, Michael Dyer from Richard Goettle Inc., Charles Fisher from Ruhlin Company, and Jim Fox from Great Lakes Construction. [23]The Respondent's bargaining committee consisted of Business Manager Patrick Sink, Dalton and, at times, business representative Premo Panzarello.

At the first bargaining meeting the Respondent made a proposal (GC Exh. 21) to amend paragraph 21e of the then current agreement to provide as follows:

> If the Employer, or any Employer subcontractor, assigns any equipment listed in exhibit A to someone other than a member of the Operating Engineers bargaining unit, the Employer shall pay, as liquidated damages, four times the applicable hourly rate plus fringe benefits to the first qualified referral registrant for all hours worked from the first day of a violation to the last day of a violation. Under no circumstances shall the Employer or Employer subcontractor remediate damages by reassigning the operation of the equipment to an Operating Engineer in order to create a jurisdictional dispute.

According to the uncontradicted and credited testimony of Linville, Sink stated that the above-noted proposal was "intended to correct the situation where contractors had assigned the equipment, forklifts, to other trades for too long and they wanted to put . . . a stop to that." (Tr. 94.) CEA bargaining committee member Dyer responded by saying that it was the Respondent's fault for allowing this to happen and that he made sure that his company used tracks on skid steers so they did not have to face the issue.

The Respondent continued to assert the new quadruple damage proposal at the meetings held on April 18 and 26. At the meeting held on April 30, Victor DiGeronimo Jr. participated in the place of Rob DiGeronimo, who was unable to attend. The Respondent's proposal for quadruple damages was still being maintained. Victor DiGeronimo testified that, during the negotiations that extended from the morning until 5:30 p.m., there was a substantial amount of discussion regarding the assignment of skid steers and forklifts. According to DiGeronimo's uncontradicted and credited testimony, Sink continued to express the position that the operation of forklifts and skid steers was "their" work and that they wanted to use the penalty clause to make sure that Operating Engineer-represented employees performed that work. (Tr. 1071–1072.) According to Linville's uncontradicted and credited testimony, Sink stated the Respondent's executive committee had met in Columbus and was ready to strike over the jurisdictional issue involving forklifts. (Tr. 119–120.)

At one point the parties were caucusing in separate rooms when Sink came to the CEA's room and asked to speak to DiGeronimo in the hallway. Sink told DiGeronimo that the assignment of forklifts and skid steers may be a strike issue for the Respondent. DiGeronimo responded by telling Sink that "no one cares but me."[24] DiGeronimo went back into the Employer's caucus rooms and told the other committee members

[19] Under the AGC agreement, third step grievances are heard by a six-member panel composed of an equal number of union and management representatives.

[20] The record establishes that Terry Joyce is the business manager for Local 310.

[21] The record establishes that the then current CEA contract with the Respondent expired on April 30, 2012.

[22] Linville testified that in early 2011 the CEA amended its code of regulations to provide that employers who were presently signatory to the CEA agreement continued to assign their bargaining rights to the CEA unless expressly revoked. Prior to this, a member had to expressly designate the assignment of its bargaining rights prior to each contract negotiation. (Tr. 55–66; GC Exhs. 11–12.)

[23] Linville took notes during all of the bargaining meetings that were approved by each party.

[24] At the trial, DiGeronimo explained his response to Sink by indicating that at the time the negotiations were being conducted the economy was in a recession; consequently there was very little work and the other employers would not be affected by a strike. DiGeronimo testified that he did have concerns about the strike threat because his company, Independence Excavating, was involved at that time in the construction of a large project, the Medical Mart, in downtown Cleveland.

what Sink had said to him.[25]

Ultimately, on April 30, the Respondent withdrew its proposal regarding quadruple damages for violations of the work jurisdiction provisions of the agreement as part of the final package to reach an agreement and the parties reached a tentative agreement that day. This agreement was ultimately ratified by each party and became effective for the period from May 1, 2012 through April 30, 2015. (GC Exh. 5.)

The Respondent Continues to File Pay-In-Lieu Grievances

Dalton testified that in early September 2012, he and the Respondent's General Counsel, William Fadel, created what the Respondent refers to as a "Miranda card" that was to be used by all of the Respondent's business agents in processing grievances over the assignment of forklifts and skid steers. According to Dalton, the intended purpose of this card was to attempt to "keep out of 10(k) hearings. (Tr. 2316.) The language contained on the card (L. 18 Exh. 90) is as follows:

> I have observed a breach of contract with your company. You have assigned someone other than an operating engineer on the [ ].
>
> Our contract provides that the penalty for this breach is to pay the first qualified registered applicant in the referral all applicable wages and fringe benefits from the first day of the breach.
>
> I am not requesting nor can you correct this breach by a reassignment of the work.

The record establishes that after early September 2012, before a grievance was filed over the assignment of forklifts and skid steers, the Respondent's business agents would personally observe an employee other than an operating engineer operating a forklift and skid steer, notify the Employer supervisor onsite of that fact, and present the supervisor with the above-noted card. Unless a business agent actually observed an employee other than an employee represented by the Respondent operating the disputed equipment, a grievance would not be filed.

Donley's

In October 2012, Donley's was the construction manager and also performed the structural concrete work for a new student center being built at Case Western Reserve University in Cleveland, Ohio. Consistent with its longstanding practice, Donley's assigned the operation of forklifts and skid steers to employees represented by Local 310 and the Carpenters.

On October 16, 2012, the Respondent filed a pay-in-lieu grievance alleging that Donley's was in breach of the 2012–2015 CEA agreement by failing to employ an operating engineer on a forklift at the Case Western Reserve University jobsite. (GC Exh. 37). On April 26, 2013, the Respondent filed another pay-in-lieu grievance alleging that Donley's breached the 2012–2015 CEA agreement by assigning someone other than an operating engineer to operate a skid steer at the Case Western Reserve University jobsite (GC Exh. 43).

Donley's has a related company related company, Donley's Restoration Group (DRG), which performs concrete restoration work on smaller jobs (under $3 million). In January 2013, DRG was performing a job at the Key Tower parking garage in Cleveland Ohio. Brian McCue, DRG's general manager, testified that DRG normally employees about 7 employees on job sites which include carpenters, finishers and laborers. McCue indicated that he normally assigns forklifts and skid steers to laborers but that they may also be assigned to a carpenter, depending upon the nature of the project. McCue testified that on the Key Tower project the operation of a skid steer was assigned to an employee represented by Local 310 and that forklifts were assigned to employees represented by Local 310 and the Carpenters. On January 14, 2013, the Respondent filed a pay-in-in lieu grievance against Donley's for assigning someone other than an operating engineer to operate forklifts at the Key Tower project (GC Exh. 42).

In July 2014, Donley's was performing structural concrete work on the Cleveland Hilton Hotel. Donley's assigned the operation of forklifts and skid steers on this project to employees represented by either Local 310 or the Carpenters. On July 14, 2014, the Respondent filed a pay-in-lieu grievance alleging that Donley's breached the 2012–2015 CEA agreement by failing to assign an operating engineer to the operation of forklifts on this project (GC Exh. 47). On August 12, 2014, the Respondent filed another pay in lieu grievance claiming that Donley's breached the CEA agreement for failing to assign an operating engineer to the operation of a skid steer (GC Exh. 60).

Hunt

Hunt is engaged in construction management services and the construction of structural concrete buildings on a nationwide basis. In October 2011, it began work on a project at Cleveland Hopkins International Airport that involved the construction of a new airport control tower and associated buildings. Hunt was both the construction manager and self performed the concrete work on this job.

On December 16, 2011, Hunt entered into a project labor agreement (PLA) with the Cleveland Building Trades Council (GC Exh. 68). While Local 310 was signatory to the PLA, the Respondent was not. The PLA indicates that all work performed by Hunt or its subcontractors is required to be performed with the "appropriate craft union signatory to this agreement." (GC Exh. 68, p. 5.)

Hunt took over the operation of cranes on the jobsite from one of its subcontractors, All Crane, and signed an interim CEA agreement with the Respondent on June 1, 2012. (L. 18 Exh. 53 A). On June 17, 2012, Hunt joined the CEA and assigned its bargaining rights to it for the purpose of bargaining with the Respondent (GC Exh. 19).[26]

David Miller was the project manager for the Cleveland Hopkins job. Miller testified that on this job site Hunt had up to three skid steers, two all-terrain forklifts, and some industrial

[25] Linville's testimony corroborates that DiGeronimo relayed Sink's statement to the bargaining committee that the assignment of forklifts and skid steers continued to be a possible strike issue.

[26] This document is mistakenly dated June 17, 2016. The record establishes that it was actually executed on June 17, 2012.

forklifts, all of which were assigned to Laborers-represented employees. All cranes on the job site were assigned to employees represented by the Respondent.

On September 26, 2012, Russell came to the Cleveland Hopkins jobsite and informed Miller that he was filing a grievance because he had observed a laborer operating an all-terrain-forklift. On September 26, 2012, the Respondent filed a pay-in-lieu grievance against Hunt alleging that it had violated the 2012–2015 CEA agreement by failing to employ an operating engineer on a forklift (GC Exh. 35).

Cleveland Cement

Cleveland Cement is a concrete contractor involved in the construction of buildings. It also performs "site work" which involves the construction of sidewalks, retaining walls, curbs and paving. John Simonetti is the vice president and part owner of Cleveland Cement. Simonetti testified that for 25 years he has been the general field superintendent in charge of day-to-day operations including the assignment of personnel. Cleveland Cement may employ up to approximately 60 employees of which 8 to 10 work full time for it throughout the year. Of the full-time employees, two are carpenters, three are finishers, three are laborers, and two are operating engineers.

According to Simonetti's uncontradicted and credited testimony, Cleveland Cement's practice had always been to assign Laborers-represented employees to forklifts and skid steers, because those pieces of equipment do not operate on a full-time basis, and it is more efficient to assign the operation of that equipment to laborers who use them in conjunction with their other duties.

Cleveland Cement performed work on the construction of a new parking garage at the Tri-C Metro campus in Cleveland, Ohio from approximately July 2012 to January 2013. In August 2012, Simonetti met with Russell and Don Taggart, business representatives for the Respondent, for a prejob conference. According to Simonetti's uncontradicted and credited testimony, during this meeting, Russell requested that Cleveland Cement assign the operation of the forklifts and skid steers that were on the project to employees represented by the Respondent Simonetti responded that he was going to continue to assign employees represented by Local 310 to operate that equipment because it was not a full-time piece of equipment. Simonetti explained that a laborer may operate a forklift or skid steer for 2 hours a day and the rest of the time would be performing other laborers' work. Russell and Taggart replied that they understood his position but they wanted him to assign the operation of that equipment to operating engineers represented by the Respondent. Simonetti declined to do so.

In August 2012, Cleveland Cement was involved in the construction of a building at the MetroHealth Medical Center in Middleburg Heights, Ohio, which is located in Cuyahoga County, Ohio. On August 12, 2012, the Respondent filed a pay-in-lieu grievance alleging that Cleveland Cement was in breach of the 2012–2015 CEA agreement on the MetroHealth jobsite by failing to employ operating engineers on a forklift and a skid steer. (GC Exh. 32.)

On October 12, 2012, the Respondent filed a pay-in-lieu grievance alleging that Cleveland Cement was in breach of the 2012–2015 CEA agreement at the Tri-C jobsite by failing to employ operating engineers on three forklifts and one skid steer. (GC Exh. 36.)

In March 2014, Cleveland Cement was involved in the construction of a building at the East Bank Flats, Phase II project in Cleveland, Ohio. On March 7, 2014, the Respondent filed a pay-in-lieu grievance alleging that Cleveland Cement was in breach of the 2012–2015 CEA agreement at the East Bank Flats, Phase II project by failing to employ operating engineers on two forklifts and a skid steer (GC Exh. 45).

In October 2014, Cleveland Cement was involved in the construction of a building at the American Greetings jobsite in Westlake Ohio. On October 1, 2014, the Respondent filed a pay-in-lieu grievance alleging that Cleveland Cement was in breach of the 2012–2015 CEA agreement at the American Greetings jobsite by failing to employ operating engineers on forklifts. (GC Exh. 46).

B & B

B & B is engaged primarily in the demolition of commercial and industrial buildings. Brian Baumann is the president of B & B and started working for the Company in 1990 as a laborer, represented by Local 310. Baumann advanced to obtain the positions of foreman, dispatcher, and general manager and has been the president of B & B since approximately 2000. Baumann testified that B & B adheres to the terms of the CEA agreement with the Respondent, but did not recall the last time that B & B had signed a CEA agreement with the Respondent.[27] Baumann also testified that B & B adheres to the CEA agreement with Local 310. Baumann further testified that B & B employs a regular work force of approximately 50 to 60 employees. Approximately 20 to 25 of those employees are operating engineers, 15 to 18 are laborers and 3 to 4 are truck drivers represented by the Teamsters. According to Baumann, B & B has always assigned forklifts and skid steers to Laborers-represented employees.

In June 2012, B & B was working on the Cleveland Browns Stadium project. B & B's work involved the demolition of a portion of the stadium prior to the commencement of new construction in that area. Baumann testified that B & B utilized four forklifts on this job site that had been assigned to Local 310-represented employees. B & B also employed Respondent-represented employees on this job site that had been assigned to operate an excavator and a mini-excavator. On June 5, 2012, the Respondent filed a pay-in-lieu grievance alleging that B & B was in breach of the 2009–2012 CEA agreement at the Cleveland Brown Stadium project for failing to employ operating engineers on four forklifts.

Baumann met with Russell and Don Taggart, representatives of the Respondent, for a step two meeting regarding this grievance in late June 2012. According to Baumann's uncontradicted

[27] Evidence introduced by the Respondent establishes that B & B was signatory to a "me too" 2009–2012 CEA agreement with the Respondent, but was not a member of the CEA. (L 18 Exh. 171 D.) I note that there is no affirmative evidence that B & B had assigned its bargaining rights to the CEA prior to the 2012 negotiations between the CEA and the Respondent or that it became signatory to the 2012–2015 CEA agreement with the Respondent in any fashion.

and credited testimony, Taggart stated that the Respondent was claiming the right to have operating engineers operate the towmotors used by B & B. Taggart offered to show Baumann an agreement between the Operating Engineers and the Laborers from 1952 in which such work had been assigned to the Operating Engineers.[28] Bauman replied that he did not need to see that agreement. Baumann replied that B & B had traditionally assigned the operation of the towmotors and skid steers to employees represented by Local 310 in Cleveland and the surrounding areas. Taggart suggested that the possible resolution would be that the employees operating the towmotors would become members of the Respondent as opposed to members of Local 310. Baumann would not agree to assign the operation of towmotors and skid steers to employees represented by the Respondent. Baumann asked Taggart why the Respondent was now seeking to have the work of operating forklifts and skid steers assigned to employees it represented and Taggart indicated that was how the Respondent intended to proceed at this time. This meeting did not resolve the grievance.

Baumann testified that this meeting was not the first time that he had discussed the assignment of the operation of forklifts and skid steers with Taggart. Baumann recalled a conversation that he had with Taggart in approximately 2001, after Taggart had first become a business agent for the Respondent.[29] Baumann testified that on that occasion he asked Taggart that if B & B wanted to assign operating engineers to operate skid steers, would the Respondent back him in a claim against Local 310, since employees represented by Local 310 had always operated the skid steers. At that time Taggart indicated that was not an argument that the Respondent was willing to engage in.[30]

In August 2012, B&B was involved in demolishing a building in Highland Hills, Ohio and had assigned employees represented by Local 310 to operate skid steers on this project. On August 31, 2012 the Respondent filed a grievance alleging that B & B had violated the 2012–2015 CEA agreement by failing to employ operating engineers on four skid steers (GC Exh. 33).

In January 2013, B&B was demolishing a building on West 117 Street and Clifton Boulevard in Cleveland, Ohio. The Respondent had one skid steer on this jobsite and its operation was assigned to a Local 310-represented employee. On January 7, 2013 the Respondent filed a pay-in-lieu grievance alleging that B & B had breached the CEA agreement by assigning someone other than an operating engineer to a skid steer at the West 117 Street at Clifton Boulevard demolition project. Approximately week after the grievance was filed, Baumann met with Russell to discuss the grievance. Russell stated that the grievance sought eight hours of pay but offered to settle the grievance for four hours pay. Baumann rejected the offer because he maintained his position that B & B does not assign operating engineers to operate skid steers but rather assigns laborers to operate that equipment.

In July 2013, B&B was involved in the demolition of a parking garage at Cleveland Hopkins Airport. B & B utilized two skid steers on this project and assigned the operation to Local 310-represented employees. On July 24, 2013, the Respondent filed a pay-in-lieu grievance alleging that the Respondent breached the CEA agreement by assigning someone other than an operating engineer to two skid steer loaders.

Precision

Precision is owned by members of the DiGeronimo family and primarily performs demolition and environmental abatement work. Anthony DiGeronimo is the principal officer of Precision. Independence Excavating, Inc. (Independence) is also owned by the DiGeronimo family and is involved in the building construction business. Rob DiGeronimo is the principal officer of Independence.

Precision began operations in approximately 1991 and was established in order to perform the demolition work on Independence job sites. At the time of the hearing, Precision employed approximately 156 employees; 150 were Laborers-represented employees and 6 were Carpenters-represented employees. At some jobsites, Precision will have as few as one employee and on other job sites it may employ up to 50 employees.

The testimony of Superintendent Rick Dolejs and General Superintendent Emory Wolf establish that Precision has historically assigned the operation of forklifts and skid steers to Laborers-represented employees. However, the assignment of such work to Laborers-represented employees has not been done on an exclusive basis. Lee Keller is a member of the Respondent who worked on a regular 40-hour week basis for Precision from 2011 to June 2013. Keller testified that during this period of time he worked for Precision on a number of job sites in the Cleveland, Ohio area and spent approximately 50 percent of his workday operating a skid steer. Keller utilized a skid steer to remove concrete, grade surfaces and perform demolition work. He also operated both industrial and all-terrain forklifts for Precision during this period and utilized such equipment to carry debris, remove concrete, and perform demolition work. During this period of time, Keller specifically recalled operating both forklifts and skid steers at the Horseshoe Casino project in Cleveland, Ohio, and operating a skid steer in the construction of a new aquarium in Cleveland. Keller operated a forklift and a bobcat skid steer at Precision projects performed for the Swagelock Corp. in Strongsville and Solon, Ohio. Finally, Keller operated a bobcat and a forklift for Precision at the Nestlé building project on W. 25th St. in Cleveland, Ohio. In June, 2013, after his hours were reduced, Keller voluntarily left Precision.

According to the uncontradicted testimony of Precision's

[28] On February 3, 1954, the Laborers International Union of North America (LIUNA) and the International Union of Operating Engineers (IUOE) entered into a Memorandum of Understanding that provided "forklifts and other similar type of equipment" will be operated by members of IUOE (L. 18 Exh. 82). In December 2012, LIUNA abrogated the 1954 agreement (L. 18 Exh. 83).

[29] Baumann and Taggart had known each other for a long time and Taggart had actually worked for B & B prior to becoming a business representative for the Respondent.

[30] I credit Baumann's uncontradicted testimony on this issue. Taggart did not testify at the trial. I find that since this conversation occurred after Taggart had become a business representative for the Respondent, Taggart was an agent of the Respondent within the meaning of Section 2(13) of the Act.

general manager, Thomas Zuckowski, Precision employed Timothy Russell, who was a member of the Respondent, from approximately 2000 until 2013. Russell operated heavy equipment on larger jobs, although Keller credibly testified that he observed Russell operate a forklift in the Precision shop during the period of 2011–2012

In September 2012, Precision was involved in a demolition project for Nestlé at a building located on W. 25th St. in Cleveland, Ohio. Dolejs testified that while he was on the job site he assigned a Local 310-represented employee to operate a skid steer. As noted above, Keller, a member of the Respondent, had also been assigned to operate a skid steer at the project. On September 21, 2012, the Respondent filed a pay-in-lieu grievance against Precision alleging that it had breached the 2012–2015 CEA agreement by failing to employ an operating engineer on a skid steer/bobcat (GC Exh. 34).

In October 2012, Precision began a job removing the asbestos and demolishing the interior of the Hanna Annex building in Cleveland, Ohio. According to Wolf's uncontradicted and credited testimony, approximately 2 weeks after the work began he, along with Anthony DiGeronimo and Zukowski , attended a prejob meeting with Respondent's representatives Russell and Taggert at Precision's offices in Independence, Ohio. At this meeting, Russell asked who would be assigned to operate the forklifts. DiGeronimo responded that laborers would be operating the forklifts. According to Wolf, Russell had an old agreement that indicated that the operation of forklifts was the work of operating engineers. DiGeronimo responded that he was going to perform the job under Local 310's agreement which was up to date and named the equipment in dispute as being Laborers' work. Russell asked if Precision would sign an updated agreement because he had not found evidence that established that the Respondent was signatory with Precision. DiGeronimo refused to sign another agreement. At that time the parties shook hands and the meeting ended.

Precision assigned the operation of forklifts and skid steers on the Hanna Annex project to employees represented by Local 310. On November 1, 2012, the Respondent filed a pay-in-lieu grievance against Precision alleging that it had breached the CEA agreement by assigning someone other than an operating engineer to work on a forklift.

In January 2013, Precision was performing a job involving the demolition of an exterior brick façade at the Westin Hotel/ Penton Media building in Cleveland, Ohio. Precision assigned the operation of forklifts and skid steers to employees represented by Local 310 on this jobsite. On January 14, 2013, the Respondent filed a grievance against Precision alleging that it had breached the CEA agreement by assigning someone other than an operating engineer on a forklift (GC Exh 40). Also on January 14, 2013 the Respondent filed another grievance against Precision alleging that it had violated the CEA agreement by assigning someone other than an operating engineer on a skid steer loader at this jobsite (GC Exh. 41).

As of the date of the hearing, all of the above noted grievances remain pending, although the Respondent has agreed to suspend the further processing of those grievances until the resolution of the instant unfair labor practice proceeding.

Facts Relating to the Respondent's Work Preservation Defense

As noted above, the CEA is a multiemployer bargaining association that has a history of bargaining with the Respondent. Prior to the commencement of negotiations in 2012, the CEA submitted a list of 28 employers that had assigned their bargaining rights to it to the Respondent. The recognition clause in the 2012–2015 collective-bargaining agreement between the CEA and the Respondent provides in relevant part (GC Exh.5, p. 3):

> The Association hereby recognizes the Union as the exclusive collective bargaining agent for all Operating Engineers (within the territory stated in Article 1) and the Union recognizes the Association as the exclusive collective bargaining agent for all Employers of the Operating Engineers . . .
>
> This Agreement is negotiated by the Association acting as negotiatingrepresentative for its members for whom it holds bargaining rights . . .

The record establishes that an employer who is not a member of the CEA and has not assigned its bargaining rights to it, may also become bound by the CEA contract with the Respondent by executing an "Acceptance of Agreement" provision located at the end of the contract.[31] This provision indicates in relevant part (GC Exh.5, p. 62):

> In consideration of the benefits to be arrived and other good and valuable consideration, the undersigned Employer or successors, although not a member of the CEA or has not assigned his bargaining rights, does hereby join in, adopt, accept and become a party to the collective bargaining agreement heretofore made by the CEA with the International Union of Operating Engineers, Local 18 and its Branches (AFL–CIO, including all of the provisions therein . . .

Finally, an employer may bind itself to the CEA agreement with the Respondent by signing what the Respondent refers to as a "CEA Short Form Agreement" The 2012–2015 short form agreement (L. 18 Exh. 29) expressly states, in relevant part:

> The Company is not represented by any employer bargaining unit nor has any employer bargaining unit authority to act as an agent for the Company; however, the Company agrees to adopt and accept all the terms, wage rates and conditions of the 2012–2015 CEA Building Agreement . . .

At the trial, Pamela Nanni, Dalton's administrative assistant, testified in detail regarding the computerized records that the Respondent utilizes to identify the employers that are bound to both the CEA and AGC agreements and the manner in which she maintains those records. Dalton also testified in detail regarding the various ways in which employers become bound to the AGC and CEA agreements and how the Respondent maintains its records regarding signatory employers. (Tr. 2238–2245). Dalton testified that with respect to both the AGC and the CEA, each association would inform the Respondent the

[31] The Respondent internally refers to this type of an agreement as a "CEA Book Agreement." (L. 18 Exh. 104.) As noted previously, the Board has referred to such agreements as a "me too" agreement. In this decision I use both terms when referring to such an agreement.

names of the employers which each Association represents and are negotiating on behalf of. The Respondent internally refers to the employers bound to the multiemployer agreements by virtue of assigning their bargaining rights to either the AGC for the CEA as an "AGC-LRD company " or a " CEA-LRD company."[32] I found the testimony of Nanni and Dalton to be credible regarding this issue and further find that the Respondent's records of signatory contractors to both the CEA and the AGC to be generally reliable evidence, with some exceptions which I specifically note.

At the trial, the Respondent introduced a document (L. 18 Exh. 188) at that it had obtained from the CEA pursuant to a subpoena. This document is a partially completed summary of a list of the contractors who had assigned their bargaining rights to the CEA from 1988 to 2014. The Respondent called Linville as a witness to authenticate the document. Linville testified that document was partially complete because all of the information contained on it had not been verified by underlying documents. According to Linville, there may be information on the summary that was not correct, there may be some contractors who should be on the list and were not, and others may be on the list but were not supposed to be. (Tr. 2292–2293.) Under the circumstances, I find this summary to be too unreliable to base any findings on it regarding the history of a contractor in assigning its bargaining rights to the CEA. In reaching this conclusion, I note that the Board has long held that because multiemployer bargaining is consensual in nature, there must be evidence of an employer's unequivocal intent to be bound by the actions of a multiemployer bargaining representative before the employer's employees become part of a multiemployer bargaining unit. *Plumbers Local 669 (Lexington Fire Protection Group),* 318 NLRB 347, 348 fn. 14 (1995); *Hunts Point Recycling Corp*., 301 NLRB 751, 752 (1991), and cases cited therein; *Ruan Transport Corp.,* 234 NLRB 241, 242 (1978). Certainly, this partially completed summary is insufficient to establish that the contractors listed on it unequivocally assigned their bargaining rights to the CEA for the period covered by it.

As noted above, 28 employers were members of, and had assigned their bargaining rights to, the CEA at the time negotiations began and were therefore bound to the 2012–2015 CEA agreement with the Respondent. In addition, the Respondent's records establish that 9 employers signed a CEA book agreement, (L 18 Exh. 171 A); 38 signed a CEA short form agreement (L. 18 Exh. 171 B); and 4 additional employers became members of the CEA and became bound to the CEA agreement in that fashion. (L. 18 Exh. 171 C).

The Respondent's records establish that 28 employers, including Donley's, Cleveland Cement, and Precision were members of the CEA and bound to the 2009–2012 CEA agreement with the Respondent. (L. 18 Exhs. 171 F) and 61 additional employers, including B & B, became signatory to the agreement by signing a book agreement. (L. 18 Exhs171 D and E; L. 18 Exh. 61).

There is no reliable evidence establishing the names and the number of employers who were members of the CEA and had assigned their bargaining rights to it for the 2006–2009 CEA agreement with the Respondent. In this connection, the Respondent introduced a record into evidence (L. 18 Exh. 171 H) which reflects the name of only one employer who had assigned its bargaining rights to the CEA for the 2006–2009 agreement with the Respondent. Thus, for this period, the Respondent's records regarding the employers who had assigned their bargaining rights to the CEA are incomplete. The Respondent's records do establish, however, that 29 employers, including Donley's, were bound to the 2006–2009 CEA agreement with the Respondent by signing a "me too" book agreement (L. 18 Exh. 171 G).

As noted above the AGC is a multiemployer association with a long history of bargaining with the Respondent for an agreement that covers most of the State of Ohio. The most recent AGC agreement with the Respondent is effective from May 8, 2013, through April 30, 2017 (L 18 Exh. 179). The immediately preceding agreement between the parties was effective from May 1, 2010, through April 30, 2013 (GC Exh. 8). Both of those agreements have the identical language in the recognition clause in article II. The relevant language provides:

> The Association hereby recognizes the Union as exclusive collective bargaining agent for all Operating Engineers (within the geographical jurisdiction area stated in Article I), and the Union recognizes the Association as the exclusive collective bargaining agent for all employers of the Operating Engineers . . .
>
> The persons, firms, corporations, joint ventures or other business entities bound by the terms of this Agreement are referred to in this agreement as "Employer" or "Employers". The Employers and the Union by entering into this agreement intend to and agree to establish a single multi-employer collective bargaining unit. Any employer who becomes a party to this agreement shall thereby become a member of the multi-employer collective bargaining unit established by this Agreement.
>
> Employers covered by this Agreement shall be free to designate their own representatives for the purpose of collective bargaining and contract administration; however, such designation shall not affect the employer's membership in the collective bargaining unit established by this Agreement.

An employer may also become bound to the AGC contract with the Respondent by executing an "Acceptance of Agreement" provision located at the end of the contract.[33] (GC Exh. 8, p. 78.) This language provides in relevant part:

> In consideration of the benefits to be derived and other good and valuable consideration, the undersigned contractor or successors, although not a member of the AGC of Ohio Labor Relations Division, does hereby join in, adopt, accept and become a party to the collective bargaining agreement heretofore made by the AGC of Ohio Labor Relations Division with the International Union of Operating Engineers, Local 18 and its Branches (AFL–CIO) . . .

[32] LRD refers to Labor Relations Division.

[33] The Respondent internally refers to this type of an agreement as an "AGC Book Agreement." (L. 18 Exh. 104.)

Finally, an employer may become bound to the AGC contract with the Respondent by executing a short form agreement. The 2013–2017 short form agreement (L. 18 Exh. 210) contains the following relevant language:

> The Company is not a member of any multi-employer bargaining group a labor agreement with the Union.
>
> The Company is not represented by any employer bargaining unit nor has any employer bargaining unit authority to act as an agent for the Company; however, the Company agrees to adopt accept all the terms, wage rates and conditions of the 2013–2017 Ohio Building Agreement . . .

The Respondent's records establish that for the 2013–2017 AGC contract with Respondent there were 27 employers who had assigned their bargaining rights to, and were members of, the AGC and therefore bound to the contract on that basis (L. 18 Exh 172 D); 67 employers executed an AGC book agreement (L. 18 Exhs. 172 A and B); and 40 executed the AGC short form agreement (L. 18 Exh. 172 C). None of these records reflect that Donley's was signatory to the agreement in any fashion.

The Respondent's records establish that for the 2010–2013 AGC contract with the Respondent there were 73 employers who had assigned their bargaining rights to and were members of, the AGC and therefore bound to the contract on that basis (L. 18 Exh. 173 D and E.) As I noted previously, Donley's Inc. is included in this record as an employer who was signatory to the 2010–2013 AGC contract with the Respondent by virtue of its membership in, and the assignment of its bargaining rights to, the AGC (L. 18 Exh. 173 D). The Respondent's records further establish that 86 employers became signatory to the 2010–2013 AGC contract with the Respondent by having signed a book agreement (L. 18 Exhs.173 A and B) and that 43 employers became signatory to that agreement by executing a short form agreement (L. 18 Exh. 173C).

The Respondent's records establish that for the May 1, 2007–April 30, 2010 AGC contract with the Respondent there were 518 employers who had assigned their bargaining rights to the AGC and were bound to the contract on that basis (L. 18 Exh. 174 E–P); 99 were signatory to the agreement by virtue of their execution of the book agreement (L. 18 Exh. 174 A–C); and 22 became signatory to the agreement by executing a short form agreement. (L. 18 Exh. 174 D). None of these records reflect that Donley's was signatory to the agreement in any fashion

The Respondent's records establish that for the AGC contract with the Respondent that was effective from May 1, 2004, through April 30, 2007, there were 93 employers were bound to the contract by virtue of their membership in the AGC (L. 18 Exhs. 175 E and F); 100 employers were signatory to the agreement by virtue of their execution of a book agreement and three employers became signatory to the agreement by executing a short form agreement (L. 18 Exh. 175 D). None of these documents reflect that Donley's was signatory to the agreement in any fashion.

The above-noted evidence establishes that there are a significant number of employers that have become bound to both the CEA and AGC contracts with the Respondent for the past several years. In support of its defense that its actions in this case support a work preservation defense, the Respondent called a substantial number of employee witnesses to testify regarding their operations operation of forklifts and skid steers for employers who were signatory to either or both the CEA and AGC agreements with the Respondent in some fashion.[34]

In this connection, Jennifer Miller testified that she has been a member of the Respondent since entering its training program in 2005 and that she received her OSHA certification for the operation of forklifts prior to becoming a journeyman operating engineer. Miller testified that she has operated a forklift or skid steer for approximately 85 to 90 percent of her total work hours. Specifically with respect to the issues relevant to the instant case, in 2007 Miller was employed by Brand Scaffold to operate a forklift on a building project at the Coshocton Ethanol plant. The Respondent's records reflect that Brand Scaffold was signatory to a "me too" AGC book agreement with the Respondent for the 2007–2010 contract (L. 18 Exh. 174 A) and that this job site was located within the jurisdiction of the AGC agreement with the Respondent. In 2013 Miller was employed by R. G Smith Co. and operated a forklift for a substantial period of time in at the Timken Steel plant in Canton Ohio. The Respondent's records reflect that R.J. Smith was bound to the 2010–2013 AGC agreement with the Respondent and is currently bound to the 2013–2017 AGC agreement with the Respondent by virtue of assigning its bargaining rights to the AGC (L. 18 Exhs. 173 E and 172B).

Julana Eakin testified that she is a member of the Respondent and received a certification for the operation of forklifts during the Respondent's training program, which she completed in 2012. Shortly afterwards, Eakin was referred to a job for the Schnabel Foundation Co. operating a forklift during the construction of a new wing at a University Hospital building in Cleveland, Ohio. The Respondent's records do not reflect the manner in which Schnabel was bound to the 2012–2015 CEA agreement with the Respondent. In June 2014 Eakin was employed by Brandenburg for 2 weeks performing demolition work with a skid steer on a building project at the Ford plant in Avon Lake, Ohio. During this project Eakin witnessed approximately 20 skid steers being operated by Operating Engineer-represented employees. The Respondent's records establish that Brandenburg was signatory to a "me too" CEA book agreement that expired on April 30, 2012 (L. 18 Exh. 171 D). There is no evidence, however, reflecting that Brandenburg was signatory to the 2012–2015 CEA Agreement with the Respondent. In the summer of 2014, Eakin was employed for approximately 1 month by Foundation Services Corp. operating a skid steer during the construction of a new building for American Greetings in Westlake, Ohio. Foundation Services Corp. was signatory to a 2012–2015 short form CEA agreement with the Re-

[34] In furtherance of its work preservation defense, the Respondent also introduced evidence establishing that the Respondent has four training facilities located throughout the State of Ohio where it has offered forklift and skid steer training since at least 1983. In this connection, the Respondent's members receive training in the operation of those pieces of equipment and can receive a certification reflecting that they have successfully completed training designed for operators of such equipment as required by OSHA.

spondent (L. 18 Exh. 171 B). Eakin estimated that approximately 70% of her work on building and demolition projects has been the operation of forklifts and skid steers.

William Harris is a member of the Respondent and was employed by Forest City Erectors from August 2011 to August 2012 at the Cleveland Medical Mart construction project in Cleveland, Ohio. During this period, Harris spent six or seven hours a day on a forklift unloading trucks and transporting supplies and material. Forest City Erectors has been a member of the CEA since 1988, and by virtue of an assignment of its bargaining rights to the CEA, was bound to both the 2009–2012 and 2012–2015 CEA agreements with the Respondent (L. 18 Exh.171F; GC Exh. 20).

Philip Latessa testified that he is been a member of the Respondent since 1979. From 2009 until June 2014 Latessa worked for Independence Excavating (Independence) on a regular basis. Independence was bound to the 2009–2012 and 2012–2015 CEA agreement with the respondent by virtue of having assigned its bargaining rights to the CEA (L. 18 Exh. 171F; GC Exh. 20). During the time that Latessa was employed by Independence he, at times, operated a skid steer, although he primarily operated other equipment such as excavators and bulldozers. In approximately 2012, Latessa was employed by Independence at the Medical Mart project in Cleveland and operated a skid steer in addition to other equipment for a period of 4 to 6 weeks. During this period Independence utilized 4 to 6 skid steers on the project. Some of the skid steers on that project were operated by employees represented by the Respondent and others were operated by employees represented by Local 310. Latessa also operated a skid steer for Independence in approximately 2013 at the Cleveland Clinic Project in Strongsville Ohio. Latessa also operated a skid steer for Independence at the East Bank Flats project in 2013. At some time during the period from 2011 to 2013, Latessa also operated a skid steer for Independence at the Horseshoe Casino project in Cleveland, Ohio.

Latessa testified that in approximately May 2013 he was working on a jobsite for Independence during the construction of an automobile dealership for the Collection Auto Group in the Cleveland, Ohio area. Latessa was operating a mini-excavator on this job then observed a laborer operating a skid steer and told the superintendent on the job, David Bevan, that the laborer was not supposed to be operating the skid steer. Bevan told him that "people that talk don't work." Latessa told Bevan that threatening him because he was objecting to something that was not right was a problem. Bevan did not respond and the conversation ended.

In approximately May 2014, Latessa was operating a skid steer for Independence during the construction of a Mini Cooper dealership for the Collection Auto Group in the Cleveland, Ohio area. Kevin DiGeronimo came up to Latessa and told him that he did not want him to operate the skid steer. DiGeronimo told Latessa, "All we want is the skid steers." Latessa replied that "they have always been ours, they have never been anybody else's" and added "if this is how it is going to be you might as well lay me off because this is not going to work." DiGeronimo said "Well I know how this is going to end." They shook hands and Latessa was shortly thereafter laid off.

Michael Cobb has been a member of the Respondent since 1995 and possesses a certification for the operation of both all-terrain and industrial forklifts. In 2001, Cobb operated an all-terrain forklift for Mosser Construction during construction work at Oberlin College in Lorain County, Ohio for an 8 month period. By virtue of its membership in the CEA and its assignment of its bargaining rights, Mosser Construction was bound to the CEA agreement with the Respondent that was effective in 2001 (L. 18 Exh. 150 A) In approximately 2012 Cobb was employed by Mickelson to operate an all-terrain forklift for 8 months at the Medical Mart project in Cleveland, Ohio. Mickelson was signatory to a 2009–2012 CEA book agreement with the Respondent (L. 18 Exh. 171D; L. 18 Exh. 188 p. 5). In 2013, Cobb operated an industrial forklift for Tesar Industrial at the at the Ford plant building projects in Avon Lake, Ohio. By virtue of the assignment of its bargaining rights to and membership in the CEA, Taser Industrial was bound by the 2012–2015 CEA agreement with the Respondent (GC Exh. 20).

Ronald Hannon has been a member of the Respondent for approximately 25 years and is certified in both the operation of industrial and all-terrain forklifts. In 2010 Hannon operated an all-terrain forklift for Richard Goettle, Inc. (Goettle) for 4 days on the Horseshoe Casino project in Cleveland, Ohio. By virtue of its assignment of its bargaining rights to and membership in the CEA, Goettle was bound to the 2009–2012 and 2012–2015 agreement between the CEA and the Respondent (L. 18 Exh. 171 F; GC Exh. 20). From June through September 2014, Hannon was employed by Forest City Erectors operating an industrial forklift during renovations at First Energy Stadium (formerly Cleveland Browns Stadium) in Cleveland, Ohio. On this project, Hannon worked with another member of the Respondent who also operated a forklift. As noted above, Forest City Erectors was bound to the 2012–2015 CEA agreement with the Respondent by virtue of assigning its bargaining rights to the CEA.

Richard Pavelecky has been a member of the Respondent for approximately 26 years. In approximately 2009 he worked for Independence operating a skid steer for approximately 6 to 7 months at a building project at Cuyahoga Community College in Cleveland, Ohio. At various times from 2012 to 2014, Pavelecky again operated a skid steer for Independence at the Medical Mart project in Cleveland, Ohio. In 2014 Pavelecky operated a skid steer for Independence during the construction of a Mini Cooper dealership in Brookpark, Ohio. As noted above, during this period Independence was bound to the CEA agreement with the Respondent by virtue of having assigned its bargaining rights to the CEA.

John McAllister has been a member of the Respondent since approximately 2011. In 2012, McAllister operated a bobcat skid steer in addition to other equipment for Marous Brothers on a building project at Fairview Hospital in Cleveland, Ohio that lasted approximately a year. In 2013, McAllister again operated a skid steer for Marous Brothers on a building project for approximately 6 months. Marous Brothers was bound to the 2009–2012 and 2012–2015 CEA agreement with the Respondent by virtue of having assigned its bargaining rights to the CEA. To (L. 18 Exh. 171 F; GC Exh. 20). At the time of the

hearing in November 2014, McAllister had been employed by Precision Engineering for six months operating a bobcat skid steer for the construction of a new building at Kent State University in Portage County, Ohio County, which is within the jurisdiction of the AGC agreement with the Respondent. The Respondent's records establish that Precision Engineering had last formally assigned its bargaining rights to the AGC for the agreement that expired in 2010 (L. 18 Exh. 174 M). Precision Engineering is signatory, however, to a CEA book agreement with the Respondent for the 2012–2015 contract. (L Exh. 18 171 A)

Everee Springer is a member of the Respondent and completed the Respondent's training program in approximately 2005. In 2013, Springer was employed by McCarl's for three months operating an all-terrain forklift on a construction project at the Timken plant in Canton Ohio. McCarl's was last bound to the AGC agreement with the Respondent by virtue of its membership in the AGC for the 2007–2010 contract (L. 18 Exh. 174 K). In 2014, Springer was employed by Independence and operated a forklift and skid steer at multiple locations in Northeastern Ohio in projects for First Energy involving the construction of infrastructure for high tension wires. Springer estimated that in the past five years she has spent approximately 75 percent of her time operating a forklifts and skid steers.

Dewayne Lewis has been a member of the Respondent since September 1998 when he entered its training program. In 2005, Lewis was employed by Gem Industrial and operated both a forklift and skid steer for approximately 4 months during the construction of a new building at the Jeep plant in Toledo, Ohio. In 2006 Lewis operated both a forklift and skid steer for Gem Industrial for approximately a month on a construction project at First Solar in Perrysburg, Ohio. These projects occurred within the jurisdiction of the AGC agreement with the Respondent. The Respondent's records indicate Gem Industrial was signatory to the 2007–2010 AGC agreement with the Respondent by virtue of its membership in the AGC (L. 18 Exh. 174 H). From 2006 to 2008, Lewis was employed by Industrial Power Systems (Industrial) on the construction of a new sulphur recovery unit and operated a forklift for the majority of the time. After that Lewis worked for Industrial for approximately 2 weeks on a construction project at the General Motors plant in Toledo, Ohio. By virtue of assigning its rights to the AGC, Industrial was bound to the 2007–2010 AGC agreement with the Respondent (L. 18 Exh. 174 I). Industrial executed a 2010–2013 AGC book contract with the Respondent (L. 18 Exh. 173 A). From August 18, 2014, through November 11, 2014, Lewis was employed by Jeffers Crane operating a forklift on a construction project at Toledo Refining Co. in Toledo, Ohio. Jeffers Crane was bound to the 2010–2013 AGC agreement with the Respondent.[35] Lewis testified that over the course of his career that he spent approximately 45 percent of his time operating a forklifts and skid steers for employers signatory to a contract with the Respondent in the Northwest Ohio area.

Hazeanne Tansel testified that she had been a member of the Respondent since 2007 when she entered its training program. Prior to graduating from the Respondent's training program in 2011, Tansel had become certified in the operation of both industrial and all-terrain forklifts. In 2008, Tansel operated a forklift for KVM Door (KVM) which was involved in constructing a new addition to the GM Powertrain plant in Toledo, Ohio. The Respondent's records do not indicate if KVM was bound to the 2007–2010 AGC agreement but do reflect that it was bound to the 2010–2013 agreement.[36] Tansel was also employed operating a forklift for approximately 2 months by Henry F. Teichman (Teichman) during the construction of a new furnace for Johns Manville in the Toledo, Ohio area. The Respondent's records reflect that Teichman was signatory to a 2010–2013 AGC book agreement (L. 18. Exh. 173 B).

Robert Morales has been a member of the Respondent since 1982 and is certified in the operation of industrial and all-terrain forklifts. Beginning in 2012 for approximately 2 ½ years, Morales operated an all-terrain forklifts for Miller Brothers Construction during the construction of a new addition to a building at the Honda plant in Russell's Point, Ohio. Miller Brothers Construction was signatory to the 2007–2010 AGC agreement by virtue of its membership in the AGC (L. 18 Exh. 174 K), but the Respondent's records do not reflect whether it has been a signatory contractor since then.

Patricia Trego has been a member of the Respondent since 1993. Trego testified that although she could not specifically recall the date, at some period between 2001 and 2009, she operated a forklift and a skid steer for R. G. Smith Co. during the construction of a new building at the Smucker's facility in Orrville, Ohio. The Smucker's facility is located in Wayne County, Ohio, which is within the jurisdiction of the AGC agreement with the Respondent. As noted above, RG Smith Co. was signatory to the 2010–2013 and 2013–2017 agreements but there is no evidence that it was signatory to an AGC agreement prior to that. At some time during the period from 2001 to 2009 Trego worked for Graycor and operated a skid the steer at the Conesville Ohio powerplant in Conesville, Ohio. This powerplant is located in Wayne County, Ohio which is within the jurisdiction of the AGC. Graycor was signatory to the 2007–2010 AGC agreement by virtue of its membership in the AGC (L. 18 Exh. 174 I)

Tara Maroney testified that she has been a member of the Respondent for approximately 26 years. In 2010 she was employed by Carls and operated both a skid steer and a forklift at a project done for the Timken Steel Company in Canton, Ohio. The work involved the rehabilitation of an existing facility and Maroney worked on the project over the course of 6 months. By virtue of its membership in the AGC, Carls was bound to the 2007–2010 AGC agreement (L. 18 Exh. 174 K).

Joseph Baumgartner completed the Respondent's training

[35] I cannot determine precisely the manner in which Jeffers Crane was bound to the 2010–2013 AGC agreement because the Respondent's records reflect both that it was a member of the AGC (L. 18 Exh. 173 D) and that it executed a 2010–2013 book AGC agreement (L. 18Exh. 173 A).

[36] I cannot determine precisely the manner in which KVM was bound to the 2010–2013 AGC agreement because the Respondent's records reflect that it was a member of the AGC (L. 18 Exh. 173 D), and executed a short form AGC agreement (L. 18 Exh. 173 C) and a book agreement (L. 18 Exh. 173 A).

program in 2014. In 2011 while still in the training program, Baumgartner operated an all-terrain forklifts for Parks Drilling (Parks) for approximately a month during the construction of the building at that Good Samaritan Hospital in Clifton, Ohio which is located within the jurisdiction of the AGC agreement. By virtue of assigning its bargaining rights to the AGC, Parks was bound to the 2007–2010 AGC agreement (L. 18 Exh. 174 L). Also on 2011, Baumgartner was employed by Nelson Stark for a couple of days operating a skid steer during the construction of a casino in Cincinnati, Ohio. Nelson Stark was signatory to a 2010–2013 AGC book agreement (L. 18 Exh. 173 B). In 2014 Baumgartner operated a skid steer for 1 week while working for Tallview Palladium on the construction of a building at Central State University in Wilberforce, Ohio. This job was performed within the jurisdiction of the AGC and Tallview Palladium was signatory to a short form AGC agreement that expired in 2013 (L 18. Exh. 173 C).

Rita Moerlein has been a member of the Respondent since April 1979 and is certified in the operation of both industrial and all-terrain forklifts. From 2008 through 2012, Moerlein operated forklifts and skid steers on several occasions while employed by Goettle on various jobs within the jurisdiction of the AGC. Goettle was bound to the 2007–2010 AGC agreement by virtue of its membership in the AGC (L. 18 Exh. 174 I). In this connection, in 2008, Moerlein was employed on an all terrain forklift for approximately 5 weeks on a jobsite for Fidelity Financial in a Northern Kentucky County within the jurisdiction of the AGC. In 2011, Moerlein operated an all-terrain forklift for approximately 2 months during the construction of the Horseshoe Casino in Cincinnati, Ohio. In 2012, Moerlein operated a skid steer and an all-terrain forklift during the construction of a new wing at Christ Hospital in Cincinnati, Ohio. In 2012, Moerlein also worked on a all-terrain forklift and a skid steer during the construction of the Miami Valley Medical Building in Troy, Ohio. Moerlein testified that she has spent approximately 1/3 of her career operating forklifts and skid steers on unionized building and construction projects.

Evan Cansler became a member of the Respondent upon entering its training program in 2002 and has a certification in the operation of all-terrain and industrial forklifts. In 2013 Cansler was employed by Sofco and operated an all-terrain forklift for approximately 2 to 3 weeks in Groveport, Ohio, which is within the jurisdiction of the AGC. Although Sofco was bound to the 2010–2013 AGC agreement, I am uncertain as to the precise basis upon which it is bound because the Respondent's records demonstrate that it signed an AGC book agreement (L. 18 Exh. 173 B) and is also bound to the AGC agreement as a member of the AGC (L. 18 Exh. 173 E). In 2014 Cansler operated a skid steer for 2 days for Foundation Services during the construction of fire station in Columbus, Ohio.

Lora Cline has been a member of the Respondent since 1992 and has a certification for the operation of both all-terrain and industrial forklifts. In 1998, Cline began operating a skid steer and all-terrain forklift for Baker during the construction of the Nationwide Arena in Columbus, Ohio, and worked on this project for approximately 2 years. Later, in 2001, Cline operated an all-terrain forklift for Baker during the reconstruction of the Ohio State University football stadium. The Respondent's records reflect that Baker was bound to the 2007–2010 AGC agreement by virtue of its membership in the AGC (L. 18 Exh. 174 F). From October 2011 to October 2012, Cline was employed by Smoot Construction operating a forklift during the construction of the Hollywood Casino in Columbus, Ohio. According to the Respondent's records, Smoot was signatory to a short form 2010–2013 AGC agreement.

Kevin Lloyd has been a member of the Respondent since 1989. In 2008, he operated an all-terrain forklift for 3 months for Parks Drilling during the construction of a computer building in New Albany, Ohio. Parks Drilling was bound to the 2007–2010 AGC agreement by virtue of its membership in the AGC (L. 18 Exh. 174 L). In the same time period, Lloyd operated a forklift for an undetermined period for Industrial Power Systems during the construction of an ethanol plant in Marion, Ohio. Industrial was bound to the 2007–2010 AGC agreement by virtue of its membership in the AGC (L. 18 Exh. 174I). In 2014, Lloyd operated a forklift for an undetermined period of time for Selinsky Force during the construction of a warehouse in Columbus, Ohio. Selinsky Force is signatory to a short form 2013–2017 AGC agreement (L. 18 Exh. 172C).

In further support of its claim that its actions in this case constitute lawful attempt to preserve bargaining unit work historically performed by its members, the Respondent introduced evidence of employees who had been referred to operate forklifts and skid steers, pursuant to the exclusive hiring hall provisions of the AGC and the CEA agreements, to employers bound by those agreements, for the period from January 2010 to October 2014. To this end, the Respondent attached an accurate summary of these referrals to its brief as "Attachment C: Referral Summaries Index."This summary is based on the credible testimony of Dalton regarding this issue; the Respondent's hiring hall referral records (L. 18 Exhs. 180, 181 and 182–186); and the evidence regarding all employers who were bound, in any manner, to the AGC and CEA agreements during the January 1, 2010 to October 2014 time frame (L. 18 Exhibits 171–175).[37] This summary reflects that during the above-noted time period, the Respondent referred 391 employees to operate a forklift or skid steer to an employer bound to the CEA or AGC agreement in some fashion.

The Respondent also introduced evidence regarding letters of assignment which contractors sent to the Respondent specifically indicating that they had assigned the operation of specified equipment to employees represented by the Respondent. Nanni testified that when she receives a letter of assignment from a contractor she transcribes the information contained in the letter to a "Letters of Assignment" list. (L. 18 Exh. 177.) This document lists the names of contractors and the equipment that was assigned to operating engineers represented by the Respondent. As relevant to this case, this document reflects the name of contractors which have assigned bobcats, forklifts and skid

[37] To the extent the evidence summarized in Attachment C contains referrals that do not reflect specifically the agreement that the employer was signatory to, I have not considered those referrals as I deem such evidence to be insufficiently reliable for my purposes. Only referrals made to employers who were signatory to either the CEA or AGC agreement in some fashion are relevant to the Respondent's work preservation defense.

steers to operating engineers represented by the Respondent. The Respondent has attached to its brief "Attachment A: Assignment List Index" which reflects the names of contractors who have made specific assignments of Bobcats, forklifts and skid steers to employees represented by the Respondent. The summary also reflects if the contractor has been bound to either the CEA or AGC agreement since 2010. The "Letters of Assignment" list introduced into evidence, however, does not reflect the time period covered by the letters of assignments that are compiled in that list. In reviewing the evidence, as it is summarized in "Attachment A," I have only considered assignments by contractors that were bound by either the AGC for the CEA agreement. Based on my review of the evidence, I find that there have been 174 instances where contractors, signatory to either the CEA or AGC agreement in some fashion, have specifically assigned the operation of bobcats, forklifts, and skid steers to employees represented by the Respondent. As noted above, however, there is no evidence establishing the time frame during which these assignments have occurred.

Finally, the Respondent contends that the settlement of a number of grievances that it filed with employers bound to either the CEA or AGC agreements, over the assignment of forklifts and skid steers to employees not represented by the Respondent, serves to support its work preservation defense. In this connection, the Respondent introduced evidence regarding the settlement of 10 such grievances during the period of 2012 and 2013. After duly considering the matter, I do not find the fact that these grievances were settled by the employers involved by payment of a penalty in the form of lost wages to the first eligible applicant in the Respondent's hiring hall supports the argument that the Respondent's actions were taken in furtherance of a lawful work preservation claim. The settlement of a grievance may occur for any number of reasons. The fact that these particular employers did not choose to contest the Respondent's grievance over the assignment of forklifts or skid steers does not serve to support the Respondent's position in this case.

Analysis and Conclusions

Section 8(B)(4)(D) makes it an unfair labor practice for a union:

> (i) to engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> . . .
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representatives for employees performing such work. . . .

As I noted above, in *Donley's I* and *Donley's II* the Board issued prior 10(k) awards involving the parties and the Respondent indicated it would not comply with those awards. The Board's decision in *Longshoremen ILWU Local 6 (Golden Grain)*, 289 NLRB 1 (1988) discusses in detail the relationship between a 10(k) proceeding and a proceeding under Section 8(B)(4)(D) of the Act. There, the Board indicated that evidence of noncompliance with a 10(k) determination, while not an independent basis to find a violation of Section 8(B)(4)(D), serves as a triggering event for the issuance of a complaint. Id. at fn. 3. The Board further indicated that when a 10(k) determination does not end the work dispute, the proceeding becomes adjudicatory following of the issuance of an unfair labor practice complaint, and that the Board must find by a preponderance of the evidence that the Respondent's conduct violated Section 8(B)(4)(D).

In support of the complaint allegations, the General Counsel and the Charging Parties contend that the Respondent violated Section 8(b)(4)(ii)(D) in early February 2012, at the Goodyear jobsite in Akron, Ohio, when Russell threatened to shut the jobsite down unless Donley's assigned the operation of forklifts to employees represented by the Respondent.

The General Counsel and the Charging Parties further contend that the Respondent violated Section 8(b)(4)(i) and (ii)(D) on February 22 and 23, 2012 when the Respondent engaged in a strike and picketed the Goodyear jobsite when an object of the strike and picketing was to obtain the assignment of the operation of forklifts and skid steers to employees represented by the Respondent.

The General Counsel and the Charging Parties allege that on April 20, 2012, the Respondent violated Section 8 (b)(4)(ii)(D) by threatening to strike Donley's because it had assigned work to employees represented by Local 894 and to Local 310 rather than employees represented by the Respondent. The General Counsel and the Charging Parties also allege that on April 30, 2012, the Respondent violated Section 8(b)(4)(ii)(D) by threatening to strike the CEA and the Employers because the Employers assigned the operation of forklifts and skid steers to employees represented by Local 310 rather than employees represented by the Respondent.

Finally, the General Counsel and the Charging Parties contend that the Respondent violated Section 8(b)(4)(ii)(D) by filing and pursuing grievances with an object of forcing the Employers to assign the operation of forklifts and skid steers to employees represented by the Respondent, contrary to the earlier 10(K) awards in *Donley's I* and *Donley's II.*

In defense of the complaint allegations, the Respondent asserts, as it did in the *Donley's I* and *Donley's II,* that the underlying jurisdictional dispute occurred as a result of collusion by the Charging Parties and the Laborers and should not be the subject of a Section 8(b)(4)(D) proceeding.

The Respondent's primary defense is that the actions alleged in the complaint, primarily its pursuit of the above-noted grievances, are lawful attempts to preserve unit work traditionally performed by its members within the AGC and CEA multiemployer bargaining units and thus do not constitute a violation of

Section 8(b)(4)(D) of the Act.

The Respondent further contends that its picketing of the Goodyear project in February 2012, was lawful representational picketing designed to protest Donley's alleged failure to sign the AGC agreement and was not related to the purported jurisdictional dispute regarding forklifts and skid steers. The Respondent contends that support for its position is shown by the fact that it removed the picket line immediately upon Donley's execution of a contract clearly binding it to the AGC agreement with the Respondent.

After considering the entire record and the arguments of the parties, I find that the Respondent has violated Section 8(b)(4)(i) and (ii)(D) of the Act as alleged in the complaint.

The Alleged Collusion Issue

In *Donley's I* slip op. at 5 fn. 6, the Board rejected the Respondent's claim that Donley's and Local 894 engaged in collusion to create a jurisdictional dispute. In *Donley's II* slip op. at p. 5 fn. 10 the Board rejected the Respondent's argument that there was collusion between the Charging Parties and Local 310. *Plasterers Local 200 (Standard Drywall, Inc.),* 357 NLRB No. 160 slip op. at 3 fn. 12 (2011), makes it clear that the issue of collusion is a threshold issue in a 10(k) proceeding that is not subject to relitigation in an unfair labor practice proceeding under Section 8(b)(4 (D). Accordingly, since the Board has considered this threshold issue in both *Donley's I* and *Donley's II* and found no merit to it in either case, I find that allegations of collusion do not serve as a defense to the instant 8(b)(4)(D) complaint.

The Threats to Picket and the Picketing

The record establishes that since at least 1998, Donley's practice has been assign the operation of forklifts and skid steers to employees represented by the Laborers and, at times, the Carpenters. As set forth above, in March 2010, at a meeting between Respondent's representatives Russell and Delong and Donley's representatives Przepiora and Dilley, the Respondent's representatives requested that Donley assign the operation of forklifts and skid steers on its projects to employees represented by the Respondent. Donley's did not acquiesce in this request. In November 2011, at a prejob meeting at the Goodyear garage project between the Respondent's representatives Russell and Lucas and Przepiora, the Respondent's representatives asked who would operate the forklifts on the job and Przepiora indicated that they would be assigned to employees represented by the Laborers and the Carpenters. At that point, Lucas stated "Let's see if these other crafts can run your tower cranes" and the Respondent's representatives left the meeting without completing the Respondent's prejob conference form.

In December 2011, Donley's began the concrete work on the Goodyear garage project. Consistent with its practice, Donley's assigned the operation of forklift and skid steer work to either employees represented by Local 894 or employees represented by the Carpenters. Donley's also utilized two tower cranes and a rough-terrain crane on the project which were operated by employees represented by the Respondent.

In early February 2012, Russell came to the Goodyear jobsite and told Przepiora that "he wanted operators on the forklifts right now." When Prezepiora responded that Donley's had never done that, Russell stated, as set forth in greater detail above, that unless Prezpiora complied with his demand, Russell would shut the jobsite down. Before he left the job site, Russell stated told Prezpiora that the Respondent was "just trying to get back what we gave away a long time ago." It is clear that when considered in the context of the background evidence, Russell's February 2012 statements constituted a threat to picket or strike in order to require Donley's to assign the operation of forklifts to employees represented by the Respondent rather than to employees represented by Local 894 or the Carpenters in violation of Section 8(b)(4)(ii)(D). *Iron Workers Local 433 (Swinerton Co.),* 308 NLRB 756, 761 (1992); *New Orleans Typographical Union No. 17 (E.P. Rivas, Inc.),* 152 NLRB 587 (1965), enfd. 368 F.2d 755 (5th Cir. 1966).

On February 22, 2012, the Respondent began picketing Donley's jobsite at the Goodyear parking garage with signs reflecting "I.U.O.E. Local 18 hereby protests against Donley's no contract." [38] The employees represented by the Respondent were operating the rough-terrain crane and the tower cranes on the project joined the picketing and consequently the jobsite had to be shut down.

On February 23, Donley's executive vice-president, Dreier, and its' general counsel, Reid, met with the Respondent's general counsel, William Fadel. While most of the meeting was devoted to whether Donley's was signatory to an agreement with the Respondent, Reid and Dreier raised the ongoing dispute between the parties involving the assignment of forklifts and skid steers. Fadel responded that " it was primarily their work to perform." In order to resolve the strike, Dreier signed a one-page "me too" agreement binding Donley's to the terms of the Respondent's existing agreement with the AGC. After Donley signed the agreement, the picketing and strike ended on February 23.

As I have noted above, the evidence is equivocal as to whether Donley's was in fact signatory to the existing AGC agreement with the Respondent prior to the meeting of February 23. It is not necessary to resolve that issue definitively, however, because even if one object of the strike and picketing was recognitional, the evidence establishes that an object of the strike and picketing was to require Donley's to assign the operation of forklifts and skid steers to employees represented by the Respondent rather than employees represented by Local 894 or the Carpenters. My conclusion in this regard is supported by Lucas' statement in November 2011, suggesting that the Respondent would remove operating engineers it represented from the operation of the tower cranes at the Goodyear project unless Donley's assigned the operation of forklifts and skid steers to Respondent-represented employees; and Russell's February 2012 unlawful threat to shut down the jobsite unless Donley's immediately assigned the operation of forklifts to employees represented by the Respondent. The Board has long

[38] The Respondent does not contend, nor is there any evidence, that Donley's was not applying the terms of the existing AGC agreement to the employees represented by the Respondent who were working on the jobsite.

held that a strike or picketing is within the ambit of Section 8(b)(4)(D) as long as one object is to coerce an employer to assign work to employees represented by particular union rather than to employees represented by another union. *Operating Engineers Local 17 (Arby Construction),* 324 NLRB 454 fn. 2 (1997); *Roofers Local 30 (Gundle Construction)*, 307 NLRB 1429 (1992), enfd. 1 F.3d 1419 (3d Cir. 1993); *Teamsters Local 50 (Schnabel Foundation),* 295 NLRB 68, 70 (1989); *Millwrights Local 1026 (Intercounty Construction)*, 266 NLRB 1049, 1051–1052 (1983). Accordingly, because an object of the Respondent's strike and picketing of the Donley's job site at the Goodyear parking garage in Akron, Ohio on February 22 and 23, 2012, was to compel Donley's to reassign the operation of forklifts and skid steers to employees represented by Respondent, I find that the strike and picketing violated Section 8(b)(4)(i) and (ii)(D) of the Act.

As noted above, on February 27, 2012, the Respondent filed a pay-in lieu grievance against Donley's under the AGC agreement for failing to employ operating engineers on its forklifts and skid steers at the Goodyear parking garage project. On April 20, 2012, representatives from the Respondent and Donley's met at the AGC office in Columbus for the third step meeting concerning this grievance. At this meeting, the Respondent's representative Totman stated that he was looking forward to coming to Cleveland "to battle" with the business manager of Local 310 over the forklift and skid steer issue. Totman then told the Donley's representatives present at the meeting that they would be sorry on May 1 when they needed the Operating Engineers and were siding with the Laborers on this issue. Dalton also stated that Donley's would be sorry in May when the negotiations began. The record establishes that the then current CEA contract with Respondent expired on April 30, 2012. I find that Totman and Dalton's statements constituted an implied threat to engage in a strike against Donley's in order to require it to assign the operation of forklifts and skid steers to employees represented by the Respondent rather than to Laborers-represented employees. Accordingly, I find that by these statements the Respondent violated Section 8(b)(4)(ii)(D) of the Act.

On April 30, 2012, at a bargaining session with the CEA, the Respondent's business manager Sink continued to assert that the operation of forklifts and skid steers was the work of Respondent-represented employees and that the Respondent wanted to use its proposed quadruple damages proposal to make sure that employees it represented performed that work. During the bargaining session, Sink stated that the Respondent was ready to strike over the jurisdictional issue involving forklifts. In a private conversation with Victor DiGeronimo Jr., one of the members of the CEA's negotiating team, Sink again stated that the issues regarding the assignments of forklifts and skid steers may be a strike issue for the Respondent. It is clear that Sink's statements indicated that the Respondent was prepared to strike the CEA in order to require the Employers involved in this proceeding to assign the operation of forklifts and skid steers to employees represented by the Respondent rather than employees represented by Local 310. Accordingly, I find that Sink's statements violated Section 8(b)(4)(ii)(D) of the Act.

The Respondent's Filing and Maintenance of Pay-In-Lieu Grievances

The Board issued its decision in *Donley I* on January 10, 2014. In this decision the Board determined that employees represented by Local 894 are entitled to perform the operation of forklifts and skid steers on the Goodyear jobsite in Akron, Ohio. Thereafter, the Respondent refused to withdraw its demand for the arbitration of the grievance that had filed against Donley's under the AGC agreement for failing to employ operating engineers on its forklifts and skid steers at the Goodyear garage project. The pay-in-lieu grievance requested as a remedy that Donley's pay to all qualified referral registered applicants the applicable wages and fringe benefits from the first day of the violation and continuing thereafter for each forklift and skid steer until the project's completion

The Board issued its decision in *Donley's II* on May 15, 2014. In *Donley's II* the Board the Board determined that employees of Donley's, B & B, Cleveland Cement, Hunt, and Precision represented by Local 310 were entitled to perform work utilizing forklifts and skid steers in the area where their employers operate and the jurisdiction of Local 310 and the Respondent overlap. Thereafter, the Respondent refused to withdraw pending-in-lieu grievances it had filed against Cleveland Cement, Precision, B & B, Donley's, and Hunt. In addition, the Respondent filed new pay-in-lieu grievances against Donley's regarding its Hilton Hotel project in Cleveland, Ohio. The first such grievance was filed on July 14, 2014 and alleges that Donley's breached the CEA agreement by failing to assign the operation of forklifts to employees represented by the Respondent. The second grievance was filed on August 12, 2014, and claims that Donley's breached the CEA agreement by failing to assign the operation of a skid steer to employees represented by the Respondent. On October 1, 2014, the Respondent filed a new grievance against Cleveland Cement alleging that it had breached the CEA agreement by failing to assign the operation of forklifts to employees represented by the Respondent at the American Greetings jobsite in Westlake, Ohio.

It is clear that by maintaining the pay-in-lieu grievances it filed before the Board's issuance of *Donley I* and *Donley II* and filing new pay-in-lieu grievances after the issuance *Donley II,* the Respondent seeks payment for work that was included in the Board's prior 10(k) awards to Laborers-represented employees. In *Plasterers Local 202 (Standard Drywall, Inc.)*, 357 NLRB No. 160 slip op. at 3 (2011), the Board explicitly held:

> It is well settled that a union's pursuit of a lawsuit or arbitration to obtain work awarded by the Board under Section 10(k) to employees represented by another union, or monetary damages in lieu of the work, has an illegal objective and violates Section8(b)(4)(ii)(D). See *Sheet Metal Workers, Local 27 (E. P. Donnelly)*, 357 NLRB No. 131 and cases cited there. And while the Supreme Court has held that a well-founded lawsuit may not be enjoined as an unfair labor practice even if filed with a retaliatory motive, the Court has recognized that a suit that has an objective that is illegal may be enjoined without violating the First Amendment. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U. S. 731, 737 fn. 5 (1983). [Footnote omitted.]

In *Plasterers Local 200*, supra, slip op at 3, the Board further noted:

> Thus, where the Board has previously ruled on a given matter, and where the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling, the lawsuit falls within the "illegal objective" exception to *Bill Johnson's. E. P. Donnelly*, supra, quoting *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991), enfd. 973 F.2d 230 (3d Cir. 1992). cert. denied 507 U. S. 959 (1993). [Footnote omitted.]

The Board has consistently held that a union's the pursuit of contractual claims seeking payment for work that was included in a prior 10(k) award to employees represented by another union violates Section 8(b)(4)(ii)(D). *Marble Polishers Local 47-T (Grazzini Bros.)*, 315 NLRB 520 (1994); *Iron Workers Local 433 (Swinerton Co.)*, 308 NLRB 756 (1992); *Longshoremen ILWU Local 13 (Sea-Land)*, 290 NLRB 616 (1988), enfd. 884 F.2d 1407, (D.C. Cir. 1989).

In *Roofers Local 30 (Gundle Construction)*, supra, the Board explained that even assuming that a union has an arguably meritorious contractual claim to particular work, it violates Section 8(b)(4)(D), by continuing to pursue its contractual claims after the Board issues a 10(k) award in which the work is awarded to employees represented by a different union. The Board held, "Such post-award conduct is properly prohibited under Section 8(b)(4)(D) because it directly undermines the 10(k) award, which, under the congressional scheme, is supposed to provide a final resolution to the dispute over which employees are entitled to the work at issue." 307 NLRB at 1430, citing *Longshoremen ILWU Local 32 (Weyerhaeuser Co.), Inc.* 271 NLRB 759 (1984), enfd. 773 F.2d 1012 (9th Cir. 1985), cert. denied 476 U.S. 1158 (1986). In this connection, in *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, the Board noted that it had been clearly established since the Supreme Court decision in *Carey v. Westinghouse*, 375 US 261 (1964) that a Board 10(k) award takes precedence over any and all contrary arbitration awards.

Applying these principles to the instant case, the Respondent's maintenance and filing of the grievances that have been set forth in detail above against the Employers seeking damages for an alleged breach of contract, after the issuance of the Board's decisions in *Donley's I* and *Donley's II,* has an illegal objective. This is so because the grievances seek to coerce the Employers into paying damages for the work awarded to Laborers-represented employees in *Donley's I* and *Donley's II* and thus act to undercut the Board's 10(k) determinations, as the Employers assigned the work consistent with the Board's awards. The fact that the grievances seek damages for an alleged breach of contract and not the reassignment of the work makes no difference as the Board has repeatedly held "this is a distinction without a difference." *Plasterers Local 200 (Standard Drywall)*, supra slip op. at 3; *Sheet Metal Workers Local 27 (E. P. Donnelly, Inc.),* supra slip op. at 3. In *Machinists Lodge 160 (SSA Marine, Inc.),* 360 NLRB No. 64 (2014) the Board held that a union's continued pursuit of monetary damages in lieu of the work after a contrary 10(k) determination violates Section 8(b)(4)(ii)(D), even when it is accompanied by an express disclaimer of interest in having the employees it represents assigned to perform the disputed work. Id. slip op. at 3. Accordingly, I find that the Respondent's conduct in maintaining the pay-in-lieu grievance filed against Donley's involving the Goodyear parking garage project, after the Board's decision in *Donley's I*, violates Section 8(b)(4)(ii)D) of the Act. I further find that the Respondent's conduct in maintaining pay-in-in lieu grievances against the Employers and filing new grievances against Donley's and Cleveland Cement involving the utilization of forklifts and skid steers in the area where the Employers operate and the jurisdiction of Local 310 and the Respondent overlap, after the Board's decision in *Donley II*, violates Section 8(b)(4)(ii)(D) of the Act.

The Respondent's Work Preservation Defense

The Respondent claims the filing of the pay-in-lieu grievances filed against the employers in this case are lawful attempts to preserve the work historically performed within the multiemployer AGC and CEA units it represents. In this connection, the Respondent contends that the multiemployer AGC and CEA units are composed of all of the employers who have bound themselves to either or both agreements. (R. Brief, pps. 117–118) The Respondent contends that the evidence of referrals of employees it represents to operate forklifts and skid steers for signatory employers establishes that this work constitutes unit work and that the grievances are lawful attempts to preserve that work

In assessing the validity of the Respondent's defense, as I noted earlier in this decision, the Board has long held that because multiemployer bargaining is consensual in nature, there must be evidence of an employer's unequivocal intent to be bound by the actions of a multiemployer bargaining representative before the employer's employees become part of a multiemployer bargaining unit. *Plumbers Local 669 (Lexington Fire Protection Group),* 318 NLRB 347, 348 fn. 14 (1995); *Hunts Point Recycling Corp*., 301 NLRB 751, 752 (1991), and cases cited therein; *Ruan Transport Corp.,* 234 NLRB 241, 242 (1978).

The fact that an employer merely adopts a collective-bargaining agreement, when it was not involved in negotiation of that agreement and did not authorize another entity to negotiate on its behalf, does not make the employer part of a multiemployer bargaining group and consequently does not make its employees part of a multiemployer bargaining unit. *Schaetzel Trucking, Inc*., 250 NLRB 321, 323 (1980); *Ruan Transport Corp*., supra at 242. In this regard, the mere adoption of an areawide collective bargaining agreement by an employer that contains a clause indicating that the employees covered under the areawide agreement shall constitute a single bargaining unit, such as the AGC agreement in the instant case, is insufficient to make the employees of that employer part of a multiemployer bargaining unit. *Hunts Point Recycling Corp*, supra at 752; *Schaetzel Trucking*, supra at 323. In addition, in the absence of unequivocal evidence that an employer has continued to assign its bargaining rights to a multiemployer association to which it once belonged, the mere fact that an employer adheres to the terms of such a multiemployer agreement does not establish that its employees remained part of a multiemployer unit. *Plumbers Local 669 (Lexington Fire Protection*

Group), supra at 348.

Applying these principles to the instant case, I do not agree that the multiemployer AGC and CEA bargaining units that the Respondent represents are as monolithic as it claims them to be.

I first examine the Respondent's CEA bargaining unit. It is clear that only the employers who have unequivocally agreed to authorize the CEA to negotiate on its behalf are members of the CEA and part of a multiemployer bargaining group. It is equally clear that only the employees of such employers are part of a multiemployer bargaining unit. As it applies specifically to the Employers in the instant case, the evidence establishes that Donley's, Cleveland Cement and Precision had authorized the CEA to represent them in negotiations for the 2009–2012 and 2012–2015 CEA agreements with the Respondent. Thus, since at least 2009 their employees were part of the multiemployer CEA bargaining unit. Hunt joined the CEA and assigned its bargaining rights to it on June 17, 2012. There is no evidence of Hunt being part of the CEA multiemployer bargaining group prior to that date.

As I have noted earlier in this decision, the record does not establish the names of the employers who had assigned their bargaining rights to the CEA and were bound to the 2006–2009 CEA agreement with the Respondent on that basis. The record does contain, however, evidence that Donley was bound to the 2006–2009 CEA agreement with the Respondent by virtue of separately signing a "me too" book agreement. Thus, for the 2006–2009 CEA agreement, Donley's employees were not part of the multiemployer CEA bargaining unit.

With respect to B & B, there is no evidence that B&B had assigned its bargaining rights to the CEA prior to the 2012 negotiations between the CEA and the Respondent or that it ever became signatory to the 2012–2015 CEA agreement with the Respondent in any fashion, although Bauman's testimony establishes that B&B has applied the terms of that agreement to its Operating Engineer represented employees. B & B was bound to the terms of the 2009–2012 CEA agreement with the Respondent by virtue of having executed a separate "me too" book agreement on February 18, 2010 (L. 18 Exh. 61).

The evidence thus establishes that for the 2009–2012 and 2012–2015 CEA agreements with the Respondent, Donley's, Cleveland Cement, and Precision assigned their bargaining rights to the CEA and thus their employees, at least for those periods, were part of a multi-employer bargaining unit. Hunt's employees became part the multiemployer bargaining unit when Hunt assigned its bargaining rights to the CEA in June 2012.

As noted above Donley's executed a "me to" book agreement with the Respondent binding it to the terms of the 2006–2009 CEA agreement as an individual signatory employer. Accordingly, for that period, its employees were not part of a multiemployer bargaining unit. There is no reliable record evidence reflecting the manner in which Precision and Cleveland Cement were bound to the 2006–2009 CEA agreement with the Respondent.

There is no reliable evidence establishing that B & B had assigned its bargaining rights to the CEA. Therefore, B & B's Respondent-employees constituted a separate unit and were not part of the multiemployer CEA bargaining unit represented by the Respondent.

I now turn to the practice of the Employers involved in this proceeding regarding the assignment of forklifts and skid steers within the jurisdiction of the CEA agreement with the Respondent. Since at least 1998 Donley's has consistently assigned the operation of forklifts and skid steers to employees represented by Local 310 and at times Carpenters-represented employees. During that period, Donley's has not assigned the operation of forklifts and skid steers to employees represented by the Respondent.

Since at least 1990, both Cleveland Cement and B & B have assigned the operation of forklifts and skid steers to employees represented by Local 310 in conjunction with their other duties. During that period, Cleveland Cement and B & B have not assigned the operation of forklifts and skid steers to employees represented by the Respondent.

Since Precision began operations in 1991, it has generally assigned the operation of forklifts and skid steers to employees represented by Local 310. However, it is also assigned the operation of forklifts and skid steers to employees represented by the Respondent. In this connection, Lee Keller is a member of the Respondent .and worked on a regular full-time basis for Precision from 2011 to June 2013 and, during this period, spent approximately 50 percent of his time operating a skid steer. Keller also operated forklifts during his employment with Precision. Precision also employed Timothy Russell, who is a member of the Respondent from approximately 2002 to 2013. While Russell typically operated heavy equipment on larger jobs, at least for the 2011–2012 period, Russell also operated a forklift at the Precision shop.

Hunt had no prior jobs within the jurisdiction of the CEA agreement with the Respondent prior to performing work at Cleveland's Hopkins airport in 2011. In June 2012 it assigned its bargaining rights to the CEA and became bound to the 2012–2015 CEA agreement with the Respondent. At the time it became bound to the CEA agreement with the Respondent, Hunt was already signatory to a PLA that Local 310 was also signatory to and had assigned the operation of forklifts and skid steers to employees represented by Local 310.

The evidence establishes that for a substantial period of time Donley's and Cleveland Cement have consistently assigned the operation of forklifts and skid steers to employees who are represented by Local 310, even during times when their employees have been part of the multiemployer CEA bargaining unit. Hunt does not have a long history of working within the jurisdiction of the CEA agreement with the Respondent, but assigned the operation of forklifts and skid steers to Local 310 pursuant to the PLA that it had executed prior to becoming party to the CEA agreement with the Respondent.

Since its inception in 1991, Precision has assigned the operation of forklifts and skid steers to employees represented by Local 310, even during the period when its Respondent-represented employees have been part of the multiemployer CEA bargaining unit. Precision has also assigned the operation of such equipment, however, to employees represented by the Respondent. In particular, during the 2011–2012 period, Precision regularly assigned the operation of forklifts and skid steers to employees represented by the Respondent, in addition to

continuing to assign such equipment to employees represented by Local 310.

For a substantial period of time, B & B has assigned the operation of forklifts and skid steers to employees represented by Local 310, and its employees have not been part of the multiemployer CEA bargaining unit represented by the Respondent. B & B has either signed an individual agreement binding it to the terms of the CEA agreement with the Respondent or merely adhered to the terms of the CEA agreement, without actually executing a contract with the Respondent.

This evidence must be viewed in the context of the evidence presented by the Respondent establishing that employees it represents have been assigned the operation of forklifts and skid steers by employers who have been bound to the terms of the CEA agreement with the Respondent in some fashion. In the first instance, the evidence establishes that the Respondent has referred a substantial number of employees to operate forklifts and skid steers to employers' signatory, in some fashion, to the Respondent's agreement with the CEA. In addition, letters of assignment from employers who were signatory to the CEA agreement with the Respondent, in some fashion, further establishes that the operation of forklifts and skid steers is considered to be unit work by those employers. Finally, the testimony of a number of employees clearly establishes that the operation of forklifts and skid steers has been assigned to employees represented by the Respondent by employers bound to the CEA agreement with the Respondent in some fashion.

As I have found above, the employees of Donley's, Precision, and Cleveland Cement were part of the multiemployer CEA bargaining unit for the period from 2009–2015, and Hunt employees were part of the multiemployer CEA bargaining unit beginning in June 2012. The testimony of several employee witnesses establishes that they operated forklifts and skid steers for employers whose employers were part of the multiemployer CEA bargaining unit at various periods of time. Thus, in addition to Keller and Timothy Russell, who had performed such work for Precision, employees Eakin, Harris, Latessa, Cobb, Hannon, Pavelecky, and McAllister had all operated either forklifts or skid steers or both for employers who had assigned their bargaining rights to the CEA. Thus, the operation of forklifts and skid steers by those employees was bargaining unit work pursuant to the terms of the CEA agreement with the Respondent.

As I have set forth above, there is no reliable evidence indicating that Donley's, Cleveland Cement, and Precision have assigned their bargaining rights to the CEA prior to 2009 and, there is no reliable evidence that B & B has ever assigned its bargaining rights to the CEA. However, even if Donley's, Cleveland Cement, Precision, and B & B had, at least for some period, assigned their bargaining rights to the CEA prior to 2009, employees represented by the Respondent have not exclusively performed the operation of forklifts and skid steers in the CEA multiemployer bargaining unit since at least 1990. In this regard, Donley's , Cleveland Cement, and B & B have never assigned the operation of forklifts and skid steers to employees represented by the Respondent, but rather have assigned such work to Local 310-represented employees and, at times, Carpenters-represented employees. Precision has assigned the operation of forklifts and skid steers typically to Local 310-represented employees but has also assigned such work to employees represented by the Respondent. While Hunt had no prior history of bargaining with the Respondent prior to June 2012, it assigned the operation of forklifts and skid steers to Local 310-represented employees pursuant to the PLA it had previously executed.

The instant dispute arose in earnest in 2012 when the Respondent demanded that the Employers assign, through proscribed means, all of the disputed work involving the operation of forklifts and skid steers to Respondent-represented employees, including the work that had previously been performed by employees represented by Local 310-represented employees or Carpenters-represented employees.

In *Carpenters (Prate Installations, Inc.),* 341 NLRB 543 (2004), rejected a contention made by the Carpenters that the facts in that case presented a work preservation dispute that did not fall within the scope of Section 10(k) and Section 8(b)(4)(D). There, the evidence established that the employer had assigned the work of shingling roofs to crews of Roofers-represented employees, to crews of Carpenters-represented employees, and to composite crews of employees represented by both those unions. The Board found that the Carpenters-represented employees had never performed such work exclusively. The Board further held, "The dispute arose when the Carpenters claimed *all* of the disputed work, including that previously performed by employees represented by the Roofers. As such, the Carpenters objective here was not that of work *preservation*, but work *acquisition*. Id. at 545. (Emphasis in the original.) Accord: *Laborers Local 265 (Henkels & McCoy, Inc.),* 360 NLRB No. 102, slip op. at 5 (2014).

Applying the principles expressed in *Carpenters (Prate Installations Inc*.) to the instant case, I find that the Respondent's objective was not that of work preservation, but rather work acquisition. This is true for Donley's, Cleveland Cement, Precision, and Hunt, who had assigned their bargaining rights to the CEA and therefore were part of the multiemployer CEA bargaining unit in 2012 but, with the exception of Precision, assigned the operation of forklifts and skid steers to their employees represented by Local 310, rather than to their employees who were represented by the Respondent. As noted above, Precision assigned the operation of forklifts and skid steers to both employees represented by Local 310 and employees represented by the Respondent. As in *Carpenters, (Prate Installations Inc.)* in 2012, through the use of proscribed means, the Respondent claimed all of the disputed work involving the operation of forklifts and skid steers, including the work that had been previously performed by Laborers-represented employees, and, at times, Carpenters-represented employees

It is even more apparent that the Respondent's objective was work acquisition with regard to B & B, since it had never assigned the operation of forklifts and skid steers to employees represented by the Respondent, and the reliable evidence establishes that B & B has not assigned its bargaining rights to the CEA, but rather either signed a separate "me to" agreement binding it to the terms of the CEA agreement with the Respondent or had merely adhered to the terms of an existing CEA agreement. Thus, B & B's Respondent-represented em-

ployees constituted a separate bargaining unit and B & B had never assigned the operation of forklifts and skid steers to those employees. Nonetheless, beginning in 2012, the Respondent demanded that B & B assign the operation of forklifts and skid steers to Respondent-represented employees and filed grievances in order to compel B & B to make such an assignment.

I next turn to Donley's history as a signatory employer to the AGC agreement with the Respondent. The Respondent introduced evidence that Donley's executed a "me to" book agreement with the Respondent binding it to the terms of the then current 1989–1992 AGC agreement with the Respondent on March 20, 1990 (L. 18 Exh. 1 B). On November 27, 2000, Donley's again executed a "me too" agreement binding it to the terms of the AGC agreement with the Respondent that was effective from May 1, 1998, through April 30, 2001 (L. 18 Exh. 1 A). As relevant to this proceeding, the language of these contracts indicated:

> [T]he undersigned contractor or successors, although not a member of the AGC of Ohio Labor Relations Division does hereby join in, adopt, accept and become a party to the collective bargaining agreement heretofore made by the AGC of Ohio Labor Relations division with the International Union of Operating Engineers, Local 18. . .

The Respondent introduced no evidence regarding the names of employers that were signatory, in any fashion, to the AGC agreement with the Respondent that was effective from May 1, 2001, through April 30, 2004. Thus, there is no evidence that Donley's was signatory to an agreement with the Respondent during this period. While the Respondent's records establish that there were approximately 200 employers bound, in some fashion, to the AGC contract with the Respondent that was effective from May 1, 2004 through April 30, 2007, there is no evidence establishing that Donley was signatory to the agreement. While the Respondent's records establish that approximately 640 employers were bound, in some fashion, to the May 1, 2007–April 30, 2010 AGC agreement with the Respondent, there is no evidence that Donley's was signatory to this agreement.

As I noted earlier in this decision, the evidence regarding whether Donley's had assigned its bargaining rights to the AGC for the 2010–2013 agreement with the Respondent is equivocal. What is clear, however, is that on February 23, 2012, the Respondent required Donley's to sign a one-page "me to" book agreement binding it to the terms of the 2010–2013 AGC agreement. As I have noted above, there is no evidence establishing whether Donley's is signatory to the 2013–2017AGC agreement with the Respondent in any fashion.

The Respondent filed its pay in-lieu grievance against Donley's under the AGC agreement for failing to employ operating engineers on its forklifts and skid steers at the Goodyear garage project on February 27, 2012. The bargaining history between Donley's and the Respondent reflects that when Donley's had signed an agreement with the Respondent, with the possible exception of the 2010–2013 agreement, it had done so by signing a "me too" book agreement. There certainly is not a long history of Donley's having assigned its bargaining rights to the AGC and consequently being part of a multiemployer bargaining unit. Rather, for the most part, if not exclusively, Donley's Respondent-represented employees constituted a separate bargaining unit.

As I have indicated earlier, since at least 1998 Donley's has consistently assigned the operation of forklifts and skid steers to Laborers-represented employees and at times Carpenters-represented employees. At the Goodyear parking garage job site and at other job sites during the period of 2011–2012 in the Akron, Ohio area, Donley's assigned the operation of forklifts and skid steers to employees represented by Local 894 and at times Carpenters–represented employees. There is no evidence that Donley's has assigned the operation of forklifts and skid steers to employees represented by the Respondent when it has performed jobs within the jurisdictional area of the AGC agreement with the Respondent.

The Respondent introduced a substantial amount of evidence establishing that employees it represents have been assigned the operation of forklifts and steers by employers who were bound the terms of the AGC agreement with the Respondent in some fashion. In this regard, the evidence establishes that through its hiring hall the Respondent has referred a substantial number of employees to operate forklifts and skid steers to employers' signatory in some fashion to the Respondent's agreement with the AGC. There are, in addition, letters of assignment from employers signatory to the AGC agreement with the Respondent in some fashion specifically assigning the operation of forklifts and skid steers to employees represented by the Respondent. Finally, the testimony of a number of employees set forth in detail above, clearly establishes that the operation of forklifts and skid steers have been assigned to employees represented by the Respondent by employers bound to the AGC agreement with the Respondent in some fashion.

With the possible exception of 2010–2013 AGC agreement, Donley's history of bargaining with the Respondent, within the jurisdiction of the AGC agreement, is to sign "me to" book agreements binding it to the terms of the AGC agreement with the Respondent, or to adhere to the terms of the AGC agreement without actually becoming signatory to it. Thus, for a great majority of the time, if not all of the time, Donley's Respondent-represented employees constituted a separate bargaining unit. As I have noted above, Donley's has a lengthy history of assigning the operation of forklifts and skid steers to employees represented by the Laborers and, at times, by the Carpenters, and not to employees represented by the Respondent. In 2012, the Respondent demanded, through proscribed means, that Donley's assign all of the disputed work involving the operation of forklifts and skid steers performed within the jurisdiction of its agreement with the AGC to Respondent-represented employees, including the work that had previously been performed by employees represented by the Laborers or the Carpenters. Given Donley's consistent practice of assigning the operation of forklifts and skid steers to employees represented by the Laborers or the Carpenters, even if Donley's employees were part of a multiemployer bargaining unit during the 2010–2013 AGC agreement with the Respondent, the Respondent's conduct evinces an object that is work acquisition, rather than that of unit work preservation, since it was claiming all of the disputed work involving the operation of forklifts and

skid steers. *Carpenters (Prate Installations, Inc.)* supra. Donley's history of generally signing a separate agreement with the Respondent binding it to the terms of the AGC agreement, or merely adhering to the terms of the AGC agreement without actually becoming signatory to it, certainly supports the finding that the Respondent's objective was to acquire work and not to preserve existing unit work, since, at least for most of the time, Donley's Respondent-represented employees constituted a separate bargaining unit and Donley's had never assigned forklift and skid steer work to those employees.

There is further evidence that the Respondent's conduct in this case establishes that its objective was work acquisition and not unit work preservation. I note, in this regard, Russell's statements to Przepiora in February 2012 at the Goodyear garage jobsite that the Respondent was trying to get back work that it had given away a long time ago. I also rely on the fact that in approximately 2001, Baumann, on behalf of B & B, asked Respondent's agent Taggart that, if B & B wanted to reassign the operation of skid steers from employees represented by Local 310 to employees represented by the Respondent, whether the Respondent would "back" B & B in a claim against Local 310, since employees represented by Local 310 had always operated the skid steers. At that time Taggart told Baumann that was an argument that the Respondent was not willing to engage in. In June 2012 Baumann and Taggart met to discuss the grievance the Respondent had filed against B & B alleging that it breached the 2009–2012 CEA agreement for failing to employ operating engineers on four forklifts at the Cleveland Brown stadium project. At this meeting, Baumann asked Taggart why the Respondent was now seeking to have the work of operating forklifts and skid steers assigned to employees it represented and Taggart merely responded by saying that was how the Respondent intended to proceed at this time.

Both of the statements establish that the Respondent was well aware in 2012 when it made the demand that operation of forklifts and skid steers be exclusively performed by employees it represented, that there had been a long practice of some employers, which were signatory to the AGC and CEA agreements with it, of assigning the operation of forklifts and skid steers to Laborers-represented employees rather than employees represented by the Respondent. As such, the statements are indicative of a work acquisition, rather than a work preservation, objective.

I find the instant case to be distinguishable from cases where, in the context of an alleged violation of Section 8(b)(4)(D), the Board has found that a valid work preservation defense was presented. In *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320 (1961), Local 107 had represented the truck drivers employed at the employer's Wilmington, Delaware meat processing plant for approximately 10 years. The employer discharged the entire bargaining unit represented by Local 107 and arranged for the unit work previously done by those employees to be done by drivers represented by other Teamsters locals who represented the drivers at two other facilities the employer operated. Thereafter, Local 107 picketed the employer's Wilmington plant with signs proclaiming that the employer was unfair to Local 107.

The Board found that the case did not involve a jurisdictional dispute as contemplated in Sections 8(b)(4)(D) and 10(k) of the Act. The Board noted that there was no real competition between Local 107 and the two other unions for the work. The dispute was solely between the employer and Local 107 and concerned only Local 107's attempt to retrieve the jobs of employees it had represented for more than 10 years through a series of collective-bargaining agreements until the employer suddenly terminated the bargaining relationship and discharged the employees. The Board found that the Local 107's picketing was a concerted effort to preserve its historical bargaining status. Accordingly, the Board found that Local 107's actions for such an object did not violate Section 8(b)(4)(D) and accordingly quashed the notice of a 10 (k) hearing.

In *Teamsters Local 578 (USCP-WESCO),* 280 NLRB. 818 (1996), affd. *USCP-WESCO v. NLRB,* 827 F.2d 581 (9th Cir. 1987), the Board found that the evidence did not establish a traditional jurisdictional dispute between two groups of employees under Section 10(k) of the Act and therefore quashed the notice of hearing. In that case, in March 1983, Safeway subcontracted the work of handling stocking and ordering certain general merchandise items to Wesco, whose employees were represented by the Teamsters. Prior to the subcontract, the disputed work had been performed by Safeway's own employees who had been represented by the UFCW for approximately 20 years. After the subcontract became effective, the UFCW filed grievances protesting the contracting of the unit work to Wesco. Thereafter, the Teamsters threatened to picket Wesco and Safeway if Wesco or Safeway assigned the work in dispute to Safeway employees represented by the UFCW. In response to the Teamsters threats, Wesco and the multiemployer association that Safeway was a member of, filed 8(b)(4)(D) charges against the Teamsters.

In its decision the Board noted:

> The real dispute here is between UFCW and Safeway, rather than between employees represented by UFCW and Teamsters, and basically involves nothing more than UFCW's attempt to enforce its contractual work preservation provision in the form of its contractual limitations on subcontracting to protect its bargaining unit from work erosion. 280 NLRB at 821.

It is clear that it was Safeway's unilateral decision to subcontract the disputed work, which historically had always been performed by employees represented by the UFCW, which caused the UFCW to file grievances protesting that the subcontract violated the agreement between Safeway and the UFCW.

In *Seafarers (Recon Refractory & Construction),* 339 NLRB 825 (2003), the Board applied the principles discussed above in finding that the employer's action in assigning work traditionally performed by employees represented by the Bricklayers, pursuant to the terms of successive collective-bargaining agreements for approximately a 10-year period, to another union presented a true work preservation dispute and, as such, was not appropriate for resolution under Section 10(k).

In *Machinists District 190, Local 1414 (SSA Terminal, LLC)*, 344 NLRB 1018 (2005), the Board quashed a notice of 10(k) hearing finding that the dispute was a true work preservation dispute rather than a jurisdictional dispute. In that case, in July

2004, the employer moved additional work, including "reefer work" (the monitoring, plugging and unplugging of refrigerated cargo containers) to the Howard terminal in Oakland, California. The employer assigned the reefer work at the Howard terminal to employees represented by the IAM. Thereafter, the ILWU filed a grievance regarding the assignment of a portion of the reefer work to the IAM.

The Board found that the dispute over reefer work began when the employer assigned the work to IAM-represented machinists at the Howard terminal in July 2004. Prior to that only ILWU-represented longshoremen had performed reefer work for the employer at the Howard terminal. The Board therefore found therefore that the employer's unilateral action of assigning to IAM-represented machinists work historically performed by ILWU-represented longshoremen created a work preservation dispute. The Board determined that such a dispute was not appropriate for resolution under Section 10(k) and quashed the notice of hearing.

In all of the above noted cases, the employers unilaterally transferred work that had been historically and exclusively performed by employees that the objecting unions had represented for a substantial period of time. Under those circumstances, the Board found that the actions taken by those unions, including the filing of grievances, presented a true work preservation argument that was not appropriate for resolution under Section 8(b)(4)(D) and Section 10 (k).

In the instant case the Employers have not unilaterally reassigned the operation of forklifts and skid steers that have been historically operated by Respondent-represented employees and thus the instant case is fundamentally different from those discussed above where the Board found that a true work preservation dispute, not amenable to resolution under Section 8(b)(4)(D) and Section 10(k), was present.

On the basis of all of the foregoing, I find no merit to the Respondent's work preservation defense and further find that the Respondent has violated Section 8(b)(4)(i) and (ii)(D) of the Act in the manner I have set forth above.

CONCLUSIONS OF LAW

1. Donley's, B & B, Cleveland Cement., Hunt, and Precision (the Employers) and the CEA are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers Local 18 (the Respondent), Laborers Local 894, a/w International Union of Board America, AFL–CIO, (Local 894) Laborers Local 310, a/w International Union of North America, AFL–CIO (Local 310), and the Ohio and Vicinity Regional Counsel of Carpenters, United Brotherhood of Carpenters and Joiners of America (Carpenters) are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in an unfair labor practice proscribed by Section 8(b)(4) (ii)(D) of the Act by threatening to picket or strike Donley's with an object of forcing or requiring Donley's to assign the work described below to employees represented by the Respondent rather than to employees represented by Local 894. The work in question consists of the operation of forklifts and skid steers as part of the construction of a parking deck at the Goodyear jobsite located at 225 Innovation Way, Akron, Ohio.

4. The Respondent has engaged in an unfair labor practice proscribed by Section 8(b)(4) (ii)(D) of the Act by threatening to strike the CEA and the Employers with an object of forcing or requiring the Employers to assign the work described below to employees represented by the Respondent rather than to employees represented by Local 310. The work in question is the utilization of forklifts and skid steers in the area where the Employers operate and the jurisdiction of Local 310 and the Respondent overlap.

5. The Respondent has engaged in an unfair labor practice proscribed by Section 8(b)(4) (i) and (ii) of the Act by picketing and engaging in a strike against Donley's with an object of forcing or requiring Donley's to assign the work described below to employees represented by the Respondent rather than to employees represented by Local 894. The work in question consists of the operation of forklifts and skid steers as part of the construction of a parking deck at the Goodyear jobsite located at 225 Innovation Way, Akron, Ohio.

6. The Respondent has engaged in an unfair labor practice proscribed by Section 8(b)(4) (ii)(D) by maintaining, after the issuance of the Board's decision in *Donley's I*, a pay-in-lieu grievance filed against Donley's for work performed by employees represented by Local 894 with an object of forcing or requiring Donley's to assign the work described below to employees represented by the Respondent rather than to employees represented by Local 894. The work in question consists of the operation of forklifts and skid steers as part of the construction of a parking deck at the Goodyear jobsite located at 225 Innovation Way, Akron, Ohio.

7. The Respondent has engaged in unfair labor practices proscribed by Section 8(b)(4)(ii) (D) by maintaining and filing, after the issuance of the Board's decision in *Donley's II*, pay in-lieu-grievances against the Employers with an object of forcing or requiring the Employers to assign the work described below to employees represented by the Respondent rather than to employees represented by Local 310, The work in question is the utilization of forklifts and skid steers in the area where the Employers operate and the jurisdiction of Local 310 and the Respondent overlap.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, International Union of Operating Engineers Local 18, its officers, agents, and representatives, shall

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Threatening to picket or strike and actually picketing and engaging in a strike against Donley's with an object of forcing or requiring Donley's to assign the work described below to employees represented by the Respondent rather than to employees represented by Local 894. The work in question consists of the operation of forklifts and skid steers as part of the construction of a parking deck at the Goodyear jobsite located at 225 Innovation Way, Akron, Ohio.

(b) Threatening to strike the CEA and the Employers with an object of forcing or requiring the Employers to assign the work described below to employees represented by the Respondent rather than to employees represented by Local 310. The work in question is the utilization of forklifts and skid steers in the area where the Employers operate and the jurisdiction of Local 310 and the Respondent overlap.

(c) Maintaining, after the issuance of the Board's decision in *Donley's I*, a pay-in-lieu grievance filed against Donley's for work performed by members of Local 894 with an object of forcing or requiring Donley's to assign the work described below to employees represented by the Respondent rather than to employees represented by Local 894. The work in question consists of the operation of forklifts and skid steers as part of the construction of a parking deck at the Goodyear jobsite located at 225 Innovation Way, Akron, Ohio.

(d) Maintaining and filing, after the issuance of Board's decision in *Donley's II,* pay-in-lieu-grievances against the Employers for work performed by employees represented by Local 30 with an object of forcing or requiring the Employers to assign the work described below to employees represented by the Respondent rather than to employees represented by Local 310. The work in question is the utilization of forklifts and skid steers in the area where the Employers operate and the jurisdiction of Local 310 and the Respondent overlap.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the pay-in-lieu grievance filed against Donley's for the work of operating forklifts and skid steers performed by employees represented by Local 894 as part of the construction of a parking deck at the Goodyear jobsite located at 225 Innovation Way, Akron, Ohio.

(b) Withdraw all pending and cease filing pay-in-lieu grievances against the Employers for work utilizing forklifts and skid steers performed by employees represented by Local 310 in the area where the Employers operate and the jurisdiction of Local 310 and the Respondent overlap.

(c) Within 14 days after service by the Region, post at its office in Cleveland, Ohio, and in any office that it maintains in Akron, Ohio, copies of the attached notice marked "Appendix."[40] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees and its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 14 days after service by the Region, sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by the Employers and the CEA, if willing, at all places or in the same manner as notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 9, 2015

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employerAct together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to picket or strike and actually picket and engage in a strike against Donley's Inc. (Donley's) with an object of forcing or requiring Donley's to assign the work described below to employees represented by International Union of Operating Engineers Local 18 (IUOE Local 18), rather than to employees represented by Laborers' Local 894, a/w International Union of North America, AFL–CIO (Laborers' Local 894). The work in question consists of the operation of forklifts and skid steers as part of the construction of a parking deck at the Goodyear jobsite located at 225 Innovation Way, Akron, Ohio.

WE WILL NOT threaten to strike the Construction Employers Association (CEA) and Donley's Inc., B & B Wrecking and Excavating, Inc., Cleveland Cement Contractors, Inc., Hunt Construction Group, Inc., and Precision Environmental Co. (the Employers), with an object of forcing or requiring the Employ-

[40] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ers to assign the work described below to employees represented by IUOE Local 18, rather than to employees represented by Laborers' Local 310, a/w International Union of North America, AFL–CIO (Laborers' Local 310). The work in question is the utilization of forklifts and skid steers in the area where the Employers operate and the jurisdiction of Laborers' Local 310 and the IUOE Local 18 overlap.

WE WILL NOT maintain, contrary to the Board's decision in *Donley's I,* 360 NLRB No. 20 (2014), a pay-in-lieu grievance filed against Donley's for work performed by employees represented by Laborers' Local 894 with an object of forcing or requiring Donley's to assign the work described below to employees represented by IUOE Local 18, rather than to employees represented by Laborers Local 894. The work in question consists of the operation of forklifts and skid steers as part of the construction of a parking deck at the Goodyear jobsite located at 225 Innovation Way, Akron, Ohio.

WE WILL NOT maintain and file, contrary to the Board's decision in *Donley's II*, 360 NLRB No. 113 (2014), pay in-lieu-grievances against the Employers for work performed by employees represented by Laborers' Local 310 with an object of forcing or requiring the Employers to assign the work described below to employees represented by the IUOE Local 18 rather than to employees represented by Laborers' Local 310. The work in question is the utilization of forklifts and skid steers in the area where the Employers operate and the jurisdiction of Laborers' Local 310 and IUOE Local 18 overlap.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL withdraw the pay-in-lieu grievance we filed against Donley's for the work of operating forklifts and skid steers performed by employees represented by Local 894 as part of the construction of a parking deck at the Goodyear jobsite located at 225 Innovation Way, Akron, Ohio.

WE WILL withdraw all pending and cease filing pay-in-lieu grievances against the Employers for work utilizing forklifts and skid steers performed by employees represented by Laborers' Local 310 in the area where the Employers operate and the jurisdiction of Laborers' Local 310 and IUOE Local 18 overlap.

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 18